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In the Supreme Court of the United States
OCTOBER TERM, 1984

**SECRETARY, UNITED STATES DEPARTMENT OF
EDUCATION, APPELLANT**

v.

BETTY-LOUISE FELTON, ET AL.

**ON APPEAL FROM THE UNITED STATES COURT
OF APPEALS FOR THE SECOND CIRCUIT**

**APPENDIX
TO
JURISDICTIONAL STATEMENT**

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 964—August Term 1983

(Argued: April 4, 1984 Decided: July 9, 1984)

Docket No. 83-6359

BETTY-LOUISE FELTON, CHARLOTTE GREEN, BARBARA
HRUSKA, MERYL A. SCHWARTZ, ROBERT H. SIDE and
ALLEN H. ZELON,

Plaintiffs-Appellants,

—against—

SECRETARY, UNITED STATES DEPARTMENT OF EDUCATION,
and THE CHANCELLOR OF THE BOARD OF EDUCATION OF
THE CITY OF NEW YORK,

Defendants-Appellees,

—and—

YOLANDA AGUILAR, LILLIAN COLON, MIRIAM MARTINEZ
and BELINDA WILLIAMS,

Intervenor-Defendants-Appellees.

Before:

FEINBERG, *Chief Judge*,
FRIENDLY and OAKES, *Circuit Judges*.

Appeal by plaintiffs from an order of the District Court for the Eastern District of New York, Edward R. Neaher, *Judge*, granting defendants' motion for summary judgment and dismissing the complaint in an action seeking declaratory and injunctive relief with respect to Title I of the Elementary and Secondary Education Act of 1965, 20 U.S.C. § 2701 *et seq.*, as applied by the New York City Board of Education, on the ground that it violates the Establishment Clause of the First Amendment. See also *National Coalition for Public Education & Religious Liberty v. Harris*, 489 F. Supp. 1248 (S.D.N.Y.), *appeal dismissed for want of jurisdiction*, 449 U.S. 808 (1980).

Reversed.

STANLEY GELLER, New York, New York, *for Plaintiffs-Appellants*.

MICHAEL JAY SINGER, United States Department of Justice, Washington, D.C., *for Defendant-Appellee Secretary of Education*.

LORNA B. GOODMAN, Assistant Corporation Counsel, New York, New York (Frederick A.O. Schwarz, Jr., Corporation Counsel,

and Leonard Koerner and Michael Gage,
New York, New York) for Defendant-
Appellee Chancellor.

JOHN J. BUCKLEY, JR., Charles H. Wilson,
Paul Mogin, Washington, D.C. (Williams
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C. Markowitz (Parker Auspitz, Neese-
mann & Delehanty, New York, New
York), for Intervenor-Defendants.

FRIENDLY, *Circuit Judge*:

The venerated language of the First Amendment pro-
vides that

Congress shall make no law respecting an estab-
lishment of religion, or prohibiting the free exercise
thereof

Title I of the Elementary and Secondary Education Act of 1965 ("the Act"), 20 U.S.C. § 2701 *et seq.*,¹ declared it to be the policy of the United States to provide financial assistance to local educational institutions serving areas with concentrations of children from low-income families to expand and improve their educational programs which contribute particularly to meeting the special educational

¹ Effective October 1, 1982, Title I was superseded by Chapter 1 of the Education Consolidation and Improvement Act of 1981, 20 U.S.C. § 3801 *et seq.*, which incorporates by reference many sections of former Title I and includes virtually identical provisions governing the participation of nonpublic school students. The decision below and the parties before us uniformly refer to Title I and the regulations issued thereunder, see 45 C.F.R. Part 116a (1979), and for clarity's sake we shall do likewise.

needs of educationally deprived children, and authorized the Commissioner, now the Secretary, of Education to make payments to State educational agencies for grants made on the basis of entitlements created by the statute. Since 1966 New York City ("the City") has been receiving federal funds to finance programs wherein it sends public school teachers and other professionals into religious and other nonpublic schools to provide remedial instruction and clinical and guidance services to students meeting the standards of the Act and the Secretary's regulations thereunder. The question is whether the Establishment Clause permits this.

We have no doubt that the program here under scrutiny has done much good and that, apart from the Establishment Clause, the City could reasonably have regarded it as the most effective way to carry out the purposes of the Act. We likewise have no doubt that the City has made sincere and largely successful efforts to prevent the public school teachers and other professionals whom it sends into religious schools from giving sectarian instruction or otherwise fostering religion. However, we hold that the Establishment Clause, as it has been interpreted by the Supreme Court in *Public Funds for Public Schools v. Marburger*, 358 F. Supp. 29 (D.N.J. 1973), *aff'd mem.*, 417 U.S. 961 (1974); *Meek v. Pittenger*, 421 U.S. 349 (1975) (particularly Part V, pp. 367-72); and *Wolman v. Walter*, 433 U.S. 229 (1977), constitutes an insurmountable barrier to the use of federal funds to send public school teachers and other professionals into religious schools to carry on instruction, remedial or otherwise, or to provide clinical and guidance services of the sort at issue here. A more elaborate statement of the facts follows.

*The Facts and the Proceedings
in the District Courts*

The Act provides for annual Congressional appropriations for programs proposed by local educational agencies ("LEAs") and approved by state education agencies ("SEAs"), 20 U.S.C. § 2731. All programs are administered solely by the LEA in the particular area and are staffed entirely with the LEA's employees. 20 U.S.C. § 2734(m); 45 C.F.R. §§ 116.42, 116a.23(f). To be eligible for Title I funds, a program must satisfy certain statutory criteria that are designed to assure that the Act's purposes are advanced. For example, Title I funds may be provided only to children who meet the dual eligibility requirement of (1) educational deprivation, defined as below age-level performance, and (2) residence in an area designated by the LEA, in accordance with Title I regulations, as having a high concentration of children from low-income families. 20 U.S.C. §§ 2722, 2732-34. Federal financing is available only for programs that will supplement, rather than supplant, non-federally funded programs that would have been available in the absence of Title I funds. 20 U.S.C. §§ 2734(f), 2736(c).

20 U.S.C. § 2740(a) provides:

To the extent consistent with the number of educationally deprived children in the school district of the local educational agency who are enrolled in private elementary and secondary schools, such agency shall make provision for including special educational services and arrangements (such as dual enrollment, educational radio and television, and mobile educational services and equipment) in which such children can participate. . . . Expenditures for educational services and arrangements pursuant to this section

for educationally deprived children in private schools shall be equal (taking into account the number of children to be served and the special educational needs of such children) to expenditures for children enrolled in the public schools of the local educational agency.

Regulations issued by the Secretary require that each LEA provide services designed to meet the needs of educationally deprived children who attend private schools, *see* 45 C.F.R. § 116a.23. Going somewhat beyond the statute, the regulations provide that the types of services to be provided shall be determined "on a basis comparable to that used in providing for the participation of public school children." *Id.*²

² If we were to look only at the language of the statute, we would not be altogether sure that a program sending public school teachers into religious schools was authorized. The examples given, to wit, dual enrollment, educational radio and television, and mobile educational services and equipment, would indicate that Congress was sensitive to the serious Establishment Clause questions that would be posed by sending public school teachers into a religious school and wished to avoid them. Consistently with such an intention, the equality requirement goes only to the amounts expended and not to the manner of expenditure. A construction that sending public school teachers into parochial schools was not intended would also have been supported by the canon of construing so as to avoid serious constitutional doubts, *see, e.g., Richmond Screw Anchor Co. v. United States*, 275 U.S. 331, 346 (1928). However, drawing on a statement in the Senate report, S. Rep. No. 146, 89th Cong., 1st Sess. 12 (1965), and remarks of two Congressmen, the Supreme Court said with respect to Title I in *Wheeler v. Barrera*, 417 U.S. 402, 422-23 & n.18 (1974) (footnote omitted), that

[i]t was anticipated, to be sure, that one of the options open to the local agency in designing a suitable program for private school children was the provision of on-the-premises instruction, and on remand this is an option open to these petitioners and the local agency.

This language, as shown by n.18, was a paraphrase of the Senate Report, not a holding of constitutionality.

The New York City Board of Education ("the Board") has developed elaborate procedures, not questioned here, for identifying the "target public school attendance areas" satisfying the economic disadvantage criteria for Title I eligibility³, *see* 20 U.S.C. § 2732, and the students in need of remedial instruction, *see* 20 U.S.C. § 2734(b). New York State has developed procedures, also not criticized here, for determining New York City's share of the Title I funds received by it. The New York City Board of Education allocates these funds between public and non-public school children according to a *per capita* formula based on the total number of public and nonpublic school students determined to be eligible for Title I services. These amounts are then scaled down to take account of budgetary constraints. In 1981-82 the nonpublic school population benefitting from the City's Title I program constituted 13.2% of the total. The constitutional problem arises from the fact that the vast majority of these nonpublic school students attend religious schools, with schools affiliated with the Roman Catholic Archdiocese of New York and the Diocese of Brooklyn accounting for 84% of such students and Hebrew day schools accounting for another 8% (1981-82 figures).

The City's initial Title I program for nonpublic school students required them to travel to public schools after regular school hours to receive remedial services from public school employees. When attendance lagged, the Board transferred some Title I services to nonpublic schools after regular school hours while maintaining other services at off-premises sites. Attendance, however, remained poor. The reasons assigned for the failure of the

³ For the 1981-82 school year, 561 of more than 900 public school attendance areas were so identified.

programs were that both students and teachers were tired, that there was concern about the safety of the children traveling home after dark or in inclement weather, and that communication between Title I teachers and other professionals and the regular classroom teachers of the nonpublic schools was virtually impossible. A solution whereby nonpublic school students could participate with public school students in programs conducted at public schools during the regular school day was rejected in part because of doubts whether under Art. XI, § 3, of the New York Constitution⁴ nonpublic school students could participate with public school students in programs conducted on public school premises during regular school hours. In consequence, on August 31, 1966, the Board adopted a resolution that remedial reading, remedial arithmetic, speech therapy and guidance counseling for educationally disadvantaged children in nonpublic schools be provided on the latters' own premises by peripatetic public school employees who would go from one school to another during the school day. Essentially that program has been continued to the present time. A study made for the 1977-78 school year indicated that a program whereby the nonpublic school students would be transplanted to public schools would involve additional expense for transportation and other costs of more than \$4.2 million, which would have been more than 42% of

⁴ This provides:

Neither the state nor any subdivision thereof shall use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught, but the legislature may provide for the transportation of children to and from any school or institution of learning.

budget for the nonpublic school Title I program. Apart from the large reduction in instructional and other services thereby entailed, the off-premises program, as alleged by the City, would have been less effective for reasons already indicated.

We interrupt this statement of the facts to indicate how the case comes before us. In 1976, the National Coalition for Public Education and Religious Liberty brought an action in the District Court for the Southern District of New York against the Secretary of Health, Education and Welfare, the United States Commissioner of Education, and the Chancellor of the New York City Board of Education to enjoin the program thus partially described as violative of the Establishment Clause. See *National Coalition for Public Education & Religious Liberty v. Harris*, 489 F. Supp. 1248 (S.D.N.Y.), *appeal dismissed*, 449 U.S. 808 (1980) [hereafter cited as "PEARL"]. An evidentiary hearing was conducted before a three-judge court in May 1979. Pursuant to an agreement reached at a pretrial conference the defendants presented the bulk of their case in the form of a narrative summary which synthesized numerous affidavits and documentary evidence describing the operations of the City's Title I program in nonpublic schools. A few witnesses were also called. In an able opinion by Senior District Judge Tenney, the court expressed itself satisfied that the program as carried out did not violate the Establishment Clause and dismissed the complaint. An appeal to the Supreme Court was dismissed for want of jurisdiction, 449 U.S. 808 (1980). We were told at argument that this was because of untimeliness.

Meanwhile, on August 11, 1978, this action for declaratory and injunctive relief with respect to the City's plan was brought by six federal taxpayers, *see Flast v.*

Cohen, 332 U.S. 83 (1968), in the District Court for the Eastern District of New York but was stayed pending the final determination of the *PEARL* case. Four individuals whose children attend nonpublic schools in the City and receive remedial educational assistance under Title I, represented by the same counsel who had represented the parent intervenors in *PEARL*, were permitted to intervene as defendants. The parties stipulated that the case was to be decided upon the record in *PEARL*, along with certain affidavits supplementing those previously filed. Judge Neaher, agreeing with the three-judge court in *PEARL*, granted defendants' motion for summary judgment and dismissed the complaint. Plaintiffs did not dispute the correctness of defendants' assertions about the basic facts, as distinguished from interlarded conclusions, insofar as such facts could be within the knowledge of the witnesses and affiants, and we have drawn and will continue to draw upon the various statements and affidavits, particularly the defendants' Statement of Material Facts Not In Dispute under former Rule 9(g) of the Eastern District, generally without particularizing the source.

Under the City's program the Board provides non-public school students—primarily, as we have stated, students enrolled in religious schools—with five types of remedial services: remedial reading, reading skills centers, remedial mathematics, English as a second language, and clinical and guidance services. No form of remedial service is provided with Title I funds if it is being provided by the nonpublic schools. The first four types of services are described in the margin.⁵ The clinical and guidance

⁵ As stated in defendants' Rule 9(g) statement, ¶ 49:

(a) The remedial reading program is designed to supplement the students' regular reading program and to raise the achievement

program is designed to enhance achievement in the four instructional programs by providing diagnosis and treatment by guidance counselors, school psychologists, social workers and psychiatrists. The instructional services are generally provided to groups of about 10 students with an emphasis on individualized instruction. The clinical and guidance professionals generally deal with students on an individual basis.

The teachers and other professionals engaged in the City's nonpublic school program are, with the exception of some physicians under special contract, regular salaried employees of the Board who have applied for such assignments. Religion is not a factor in the assignment. Determination of which nonpublic schools a teacher or other professional shall serve is made by the administrators of the City's Bureau of Nonpublic School Reimbursable Services. The amount of time that a particular teacher or other professional will spend at any one non-public school is determined by the number of students eligible for the Title I program and the needs of such

levels of students in grades one through twelve who are reading one or more years below their grade level.

(b) The reading skills center program provides more intensive remedial reading instruction for students in grades four through eight whose reading achievement levels are as much as five years below grade level.

(c) The remedial mathematics program offers remedial instruction to students in grades one through twelve whose scores on standardized tests show them to be six months or more below grade level in mathematics.

(d) The English as a second language program is designed primarily for very young children or students who have recently arrived in the United States. That program provides basic instruction in the English language, with emphasis on oral proficiency, to enable the students to achieve the competency and fluency in the English language which is necessary for them to participate effectively in regular instructional programs.

students. During the 1981-82 school year, some 78% of all Title I teachers and other professionals spent less than five days a week in the same public school and worked in more than one; children in 180 of the 231 nonpublic schools with Title I services received these from itinerant teachers; all non-teacher professionals were itinerant. Affidavits of a considerable number of teachers demonstrate that a large majority work in nonpublic schools with religious affiliations different from their own.

Instructions issued to the teachers and other professionals by the Bureau of Nonpublic School Reimbursable Services emphasize their accountability to their Title I supervisor and their nonaccountability to any nonpublic school official. They are solely responsible for the selection of students for the program and are to take all necessary steps to assure that materials and equipment provided for Title I activities are used only therein. They are not to engage in team-teaching or other cooperative instructional activities with nonpublic school teachers, to become involved with religious activities of the nonpublic schools or to introduce any "religious matter" into their teaching. While it is deemed necessary for the Title I teacher to confer with the regular classroom teachers of the nonpublic schools concerning the students' needs and progress in that classroom environment, the Title I teachers are instructed to confine these consultations to mutual professional concerns about the students' educational needs and not to engage in any discussion of matters of a religious nature.

The Title I teachers and other professionals are subject to the supervision of field supervisors, each of whom is ordinarily responsible for 22 Title I teachers and attempts to make at least one unannounced visit per month. The field supervisors are in turn supervised by program coor-

dinators. While they too make occasional unannounced visits, a principal method of carrying out their responsibilities is through monthly in-service training sessions, frequently held on days when the public schools are in session but the nonpublic schools are observing a religious holiday. Defendants emphasize the absence of any recorded complaint by a Title I teacher of interference by nonpublic school authorities or of any reports by supervisors that teachers have engaged in religious activity.

Teaching materials and equipment used in the Title I program are selected by City employees. The teaching materials are not to duplicate materials used in regular classroom instruction or to have any religious content. All such equipment and materials are labeled as property of the Board for use in the Title I program, are locked in storage and filing cabinets when not in use and are subject to an annual inventory.

Before approving the assignment of Title I teachers or other professionals to a nonpublic school, an administrator of the Board's Office of Special Projects informs the principal of applicable federal, state and local guidelines, including the requirement that any room used for Title I instruction or support service be free of religious symbols and artifacts. Nonpublic schools with children receiving Title I instructional services "typically" reserve a classroom for the exclusive use of Title I teachers. The clinical and guidance professionals customarily use the nurse's room or a comparable facility. Defendants assert broadly that "[n]one of the nonpublic school facilities used for Title I remedial instruction or support services contains any religious statues, symbols, pictures or artifacts."

Administrative contacts between the Board's Office of Special Projects and nonpublic school officials are said to be of a routine character, falling into three general catego-

ries—the Board's dissemination of information, its processing of requests for services by the nonpublic schools, and its annually requesting information needed for a survey of the workings of the program. While there have been criticisms of nonpublic school principals by the Board and *vice versa*, none of them has turned on matters of religion.

Defendants' statement of the facts concerning the operation of the Title I program in nonpublic schools may be summarized by quoting an observation from a 1971 report by the United States Office of Education: "Title I creates the unusual situation in which an educational program may operate within the private school structure but be totally removed from the administrative control and responsibility of the private school." *United States Office of Education (USOE) Program Guide No. 44* (1968), reproduced in *Title I ESEA, Participation of Private School Children, A Handbook for State and Local Officials*, U.S. Department of Health, Education and Welfare, Publication No. (OE) 72-62, p. 8 (1971).

DISCUSSION

1) *The Supreme Court's decisions with respect to government aid to religious schools*

Although the briefs have included a generous sampling of the Supreme Court's decisions in regard to the Establishment Clause, there are a sufficient number dealing with the problem of government aid to religious schools and, indeed, with the very problem here presented—the sending of public school teachers and other professionals into such schools to engage in remedial teaching and to provide clinical and guidance services—that we think it

best to confine ourselves largely to these decisions, with particular emphasis on the latter. In a field that has been so thoroughly ploughed by the Supreme Court, the function of an inferior federal court is not to make an independent interpretation of the constitutional text or to engage in creative distinctions but to do its best to follow what the Court has said. We have thought it necessary to analyze the Court's relevant pronouncements at some length, and generally in chronological order, since our reading of many of them differs materially from that of the three-judge court in *PEARL*, *supra*, 489 F. Supp. 1248.

The starting point of modern Establishment Clause jurisprudence on state aid to parochial schools is *Everson v. Board of Education*, 330 U.S. 1 (1947). There, after a thorough exposition of the history and purpose of the Establishment Clause by Justice Black, a bare majority of the Court held that the clause was not violated by a state's spending tax-raised funds to reimburse parents of parochial school pupils for their children's bus fares as part of a general program under which it paid the fares of pupils attending public and other non-profit schools; Justice Black thought that such action "approache[d] the verge" of the state's constitutional power, 330 U.S. at 16. Four Justices, in two eloquent dissents by Justices Jackson and Rutledge, believed it went over the verge.

A score of years later, the Court moved the verge a considerable distance in *Board of Education v. Allen*, 392 U.S. 236 (1968), where it sustained a New York law requiring local public school authorities to lend textbooks free of charge to all students in grades 7 to 12, including those in private schools. Justice White placed some emphasis on the fact that "[b]ooks are furnished at the request of the pupil and ownership remains, at least

technically, in the State. Thus no funds or books are furnished to parochial schools, and the financial benefit is to parents and children, not to schools." 392 U.S. at 243-44. Justice Black dissented, finding a basic distinction between the provision of transportation, lunches, and police and fire protection, and the lending of textbooks, 392 U.S. at 252-53. Justices Douglas and Fortas also filed dissents.

The Court returned to the subject in *Lemon v. Kurtzman* and its companion case, *Earley v. DiCenso*, 403 U.S. 602 (1971). Chief Justice Burger pointed out, as had Justice Rutledge in his dissent in *Everson*, that the Establishment Clause prohibits not simply the establishment of a state church but any law "respecting" an establishment of religion, and that "[a] given law might not establish a state religion but nevertheless be one 'respecting' that end in the sense of being a step that could lead to such establishment and hence offend the First Amendment." 403 U.S. at 612 (emphasis in original). He continued, in what has become an oft-quoted passage, 403 U.S. at 612-13:

Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally, the statute must not foster "an excessive government entanglement with religion."

Excessive entanglement was found to exist in a Rhode Island statute providing for up to a 15% salary supplement to teachers in nonpublic schools in which the

average per-pupil expenditure on secular education was below the average in public schools, conditioned on the teachers' giving only courses offered in the public schools, using only materials used in the public schools and agreeing not to teach courses in religion. Excessive entanglement was found also in a Pennsylvania statute authorizing the state's "purchase" of certain "secular educational services" from nonpublic schools, such purchase being restricted to courses in specified subjects, with the textbooks and materials to be approved by the state and with no payment to be made for any course containing any subject matter reflecting religious teachings or the morals or forms of worship of any sect.⁶

The Court said, with respect to the Rhode Island statute, 403 U.S. at 619:

A comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed and the First Amendment otherwise respected. Unlike a book, a teacher cannot be inspected once so as to determine the extent and intent of his or her personal beliefs and subjective acceptance of the limitations imposed by the First Amendment. These prophylactic contacts will involve excessive and enduring entanglement between state and church.

The Pennsylvania statute suffered from the same defect, exacerbated by the fact that it provided state financial aid directly to the sectarian schools, an arrangement "pregnant with involvement" between church and state. 403

6 The decision in regard to the Pennsylvania statute led inexorably to summary affirmance in *Sanders v. Johnson*, 403 U.S. 955 (1971), aff'g 319 F. Supp. 421 (D. Conn. 1970), where the district court had invalidated a similar Connecticut statute.

U.S. at 622 (quoting *Walz v. Tax Commission*, 397 U.S. 664, 675 (1970)). The Court spoke also of “[a] broader base of entanglement” inherent in “the divisive political potential of these state programs”, and said that this potential was aggravated “by the need for continuing annual appropriations and the likelihood of larger and larger demands as costs and populations grow”, 403 U.S. at 622-23. The Chief Justice also pointedly remarked, 403 U.S. at 624-25:

Nor can we fail to see that in constitutional adjudication some steps, which when taken were thought to approach “the verge,” have become the platform for yet further steps. A certain momentum develops in constitutional theory and it can be a “downhill thrust” easily set in motion but difficult to retard or stop. Development by momentum is not invariably bad; indeed, it is the way the common law has grown, but it is a force to be recognized and reckoned with. The dangers are increased by the difficulty of perceiving in advance exactly where the “verge” of the precipice lies. As well as constituting an independent evil against which the Religion Clauses were intended to protect, involvement or entanglement between government and religion serves as a warning signal.

On the same day as *Lemon*, the Court decided *Tilton v. Richardson*, 403 U.S. 672 (1972). A bare majority sustained, with one qualification, provisions of the Higher Education Facilities Act of 1963, which authorized federal grants to institutions of higher education, which the Court construed as including church-related institutions, for the construction of facilities other than those used for sectarian instruction, for religious worship, or primarily

in connection with the program of a school or department of divinity. The statutory restrictions were to be enforced by the Office of Education primarily by way of on-site inspections. This result, seemingly at odds with that in *Lemon*, rested in large part on the Court's conclusion, 403 U.S. at 685, that "[t]here are generally significant differences between the religious aspects of church-related institutions of higher learning and parochial elementary and secondary schools." Quoting from *Walz v. Tax Commission*, 397 U.S. 644, 671 (1970) (sustaining tax exemptions to religious organizations), the Court said that the "affirmative if not dominant policy" of the instruction in pre-college church schools is "to assure future adherents to a particular faith by having control of their total education at an early age", whereas Congress might well have thought that college students were less impressionable and less susceptible to religious indoctrination. The Court noted that, by nature, "college and postgraduate courses tend to limit the opportunities for sectarian influence by virtue of their own internal disciplines", and that "[m]any church-related colleges and universities are characterized by a high degree of academic freedom and seek to evoke free and critical responses from their students", 403 U.S. at 686 (footnote omitted). The evidence showed that the four schools there in question, while governed by Catholic religious organizations and having predominantly Catholic faculties and student bodies, admitted non-Catholics as students and gave faculty appointments to non-Catholics. None required students to attend religious services and, although all four required students to take theology courses, the parties had stipulated that these were taught according to the academic requirements of the subject matter, covered a range of human religious experiences, and made no at-

tempt to indoctrinate students or to proselytize. Since religious indoctrination was not a substantial purpose or activity of these church-related colleges and universities, there was less likelihood than in primary and secondary schools that religion would permeate the area of secular education. The inspections "necessary to ascertain that the facilities are devoted to secular education" were therefore characterized as "minimal", 403 U.S. at 687. Emphasis was also placed on the fact that the Government was subsidizing buildings, not—as in *Lemon*—teachers, who "are not necessarily religiously neutral", and that the Government aid was "a one-time, single-purpose grant", 403 U.S. at 687-88. Finally, the Court observed that these factors, plus the diverse and widely dispersed student constituency of colleges and universities, also substantially lessened the potential for divisive religious fragmentation in the political arena.

Tilton was followed, again with respect to a college, by a differently composed Court, this time by a vote of 6-3, in *Hunt v. McNair*, 413 U.S. 734 (1973).⁷ In contrast, *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973), decided the same day as *Hunt*, struck down three financial aid programs which New York had devised for nonpublic elementary and secondary schools. One program was an annual grant of \$30 or \$40 per student for maintenance and repair of facilities and equipment to ensure students' health, welfare and safety in schools serving a high concentration of low-income families, not, however, to exceed 50% of the average per-pupil cost of equivalent maintenance and

⁷ Justices Black and Harlan, the former of whom had dissented and the latter of whom had concurred in *Tilton*, had been succeeded by Justices Powell and Rehnquist, both of whom joined the majority in *Hunt*. Justices Douglas, Brennan and Marshall dissented in both cases.

repair services in the public schools. A second program reimbursed parents of children attending nonpublic elementary or secondary schools whose annual taxable income was less than \$5,000, in amounts of \$50 per grade school child and \$100 per high school student so long as those amounts did not exceed 50% of tuition actually paid. The third program authorized income tax deductions, in amounts decreasing as gross income increased, for each dependent child in a nonpublic school for whom the parent had paid at least \$50 in tuition. Justice Powell, writing for a majority, held that each of these programs violated *Lemon's* "primary effect" test. Referring to *Everson*, *Allen*, and *Tilton*, he recognized that "some forms of aid may be channeled to the secular without providing direct aid to the sectarian", but characterized these cases as showing that "the channel is a narrow one." 413 U.S. at 775. While the holding that the programs had the impermissible primary effect of advancing religion made consideration of the entanglement issue unnecessary, Justice Powell felt prompted, 413 U.S. at 794,

to make the further observation that, apart from any specific entanglement of the State in particular religious programs, assistance of the sort here involved carries grave potential for entanglement in the broader sense of continuing political strife over aid to religion.

He went on to say, much as the Chief Justice had done in *Lemon*, that

we know from long experience with both Federal and State Governments that aid programs of any kind tend to become entrenched, to escalate in cost, and to generate their own aggressive constituencies. And the larger the class of recipients, the greater the

pressure for accelerated increases. Moreover, the State itself, concededly anxious to avoid assuming the burden of educating children now in private and parochial schools, has a strong motivation for increasing this aid as public school costs rise and population increases. In this situation, where the underlying issue is the deeply emotional one of Church-State relationships, the potential for seriously divisive political consequences needs no elaboration. And while the prospect of such divisiveness may not alone warrant the invalidation of state laws that otherwise survive the careful scrutiny required by the decisions of this Court, it is certainly a "warning signal" not to be ignored.

413 U.S. at 797-98 (footnotes omitted). The Court followed *Nyquist* in two more cases decided that day. In *Sloan v. Lemon*, 413 U.S. 825 (1973), it invalidated a similar Pennsylvania tuition reimbursement scheme. In *Levett v. Committee for Public Education & Religious Liberty*, 413 U.S. 472 (1973), in an opinion by the Chief Justice, it applied *Nyquist* to invalidate another New York program under which the state reimbursed nonpublic schools for certain costs of administering tests "mandated" by the state but prepared by the nonpublic schools; only Justice White dissented. A different view was later to be taken with respect to state-prepared tests, whether graded solely by the state, as in *Wolman v. Walter*, 433 U.S. 229 (1977), or in part by nonpublic school personnel, as in *Committee for Public Education & Religious Liberty v. Regan*, 444 U.S. 646 (1980).

It is with this background that we come to the four cases in which the Court has considered programs such as that here *sub judice*.

Wheeler v. Barrera, 417 U.S. 402 (1974), was the first case in which the Court gave plenary consideration to the application of Title I of the Act to parochial schools.⁸ Parents of children attending nonpublic schools in the inner city area of Kansas City, Missouri, complained that the State Commissioner of Education and the Missouri Board of Education were violating Title I in that they were allocating money to Title I programs in public schools but not making "comparable" expenditures for children in parochial schools in the district. Although remedial teachers were employed in the public schools, the defendants had failed to send public school teachers into the parochial schools during regular hours on the grounds that this was forbidden under Missouri law and the First Amendment and that Title I did not so require. On the other hand, mobile educational services and equipment, visual aids, and educational radio and television had been provided, as had been teachers for after-school, weekend, and summer school classes, apparently

⁸ We pass over the denial of certiorari, 409 U.S. 921 (1972), in *Nebraska State Board of Education v. School District of Hartington*, 188 Neb. 1, 195 N.W.2d 161 (1972), in what might have been the Court's first encounter with the use of Title I funds in connection with a parochial school. Justice Douglas, joined by Justice Marshall, dissented from the denial of certiorari. Justice Brennan, who joined in denying the petition, filed an opinion pointing out the special facts involved. There were no available classrooms in the public schools but two were available in a parochial school. The school district proposed to lease these classrooms for instruction by public school teachers of both public and parochial school students. "Thus, the school district would have no part whatever in the curriculum of the parochial school either by way of subsidy of its costs through financing of teaching or otherwise." 409 U.S. at 926. That Justice Brennan did not consider his *Hartington* opinion as sanctioning the sending of public school teachers into parochial schools to give remedial instruction to pupils in those schools is made evident by his later opinions in *Meek* and *Wolman*, *infra*. The view of the three-judge court, 489 F. Supp. at 1264, that Justice Brennan's remarks in *Hartington* "are particularly relevant to the case at bar" affords some measure of the difference in our reading of the precedents.

held in the public schools but open to parochial school pupils. A divided court of appeals held that the defendants were in violation of the Act, *see* 475 F.2d 1338 (8 Cir. 1973).

The Court, in an opinion by Justice Blackmun, considered the case to present two issues: "First, whether Title I requires the assignment of publicly employed teachers to provide remedial instruction during regular school hours on the premises of private schools attended by Title I eligible students, and, second, whether that requirement, if it exists, contravenes the First Amendment." 417 U.S. at 415. The Court answered the first question by saying that Title I permitted but did not require such assignment. The Court declined to pass on the second issue since no order had been entered requiring "public school teachers paid with Title I funds [to be sent] into parochial schools to teach remedial courses", 417 U.S. at 426. The Court went on to say:

Moreover, even if, on remand, the state and local agencies do exercise their discretion in favor of [on-premises] instruction, the range of possibilities is a broad one and the First Amendment implications may vary according to the precise contours of the plan that is formulated. For example, a program whereby a former parochial school teacher is paid with Title I funds to teach full time in a parochial school undoubtedly would present quite different problems than if a public school teacher, solely under public control, is sent into a parochial school to teach special remedial courses a few hours a week. *At this time we intimate no view as to the Establishment Clause effect of any particular program.*

Id. (emphasis supplied.)

We think *Wheeler* has little bearing on the present case. It shows only that a majority of the Court regarded the question of the constitutionality of sending public school teachers into parochial schools to perform Title I programs to be debatable, with Justice Douglas indicating a clear preference for a holding of unconstitutionality, Justice White indicating a clear preference for a holding of constitutionality, and Justice Powell voicing "serious misgivings" in regard to constitutionality.⁹ The case does not stand for the proposition, intimated in *PEARL, supra*, 489 F. Supp. at 426, that programs like the one here at issue are to be judged by their *results*. The holding in *Wheeler* was simply that the Court would not decide an issue that had not been and might never be presented, with a statement that when and if it was, decision *might* "vary according to the precise contours of the plan that is formulated"; the Court was at pains to say that it "intimate[d] no view as to the Establishment Clause effect of any particular program." 417 U.S. at 426.

In fact, at that very time the Court had under advisement a case substantially raising the constitutional issue bypassed in *Wheeler* and decided it summarily on the side of unconstitutionality only a week later, *Public Funds for*

⁹ Justice Powell, joining the Court's opinion, observed, 417 U.S. at 428:

I would have serious misgivings about the constitutionality of a statute that required the utilization of public school teachers in sectarian schools. See *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973).

Justice White, also concurring, said, 417 U.S. at 429, that he was pleasantly surprised by what appears to be a suggestion that federal funds may in some respects be used to finance nonsectarian instruction of students in private elementary and secondary schools.

Justice Douglas, dissenting, *id.*, thought the Court should have decided that none of the proposed forms of aid to parochial schools was constitutional.

Public Schools v. Marburger, 417 U.S. 961 (1974), *aff'g mem.* 358 F. Supp. 29 (D.N.J. 1973).¹⁰ A New Jersey statute furnished State aid to the parents of nonpublic school students in amounts up to \$10 per elementary school student and \$20 per high school student as reimbursement for the cost of secular, nonideological textbooks, instructional materials and supplies. It also provided that the amount left from the total appropriation after the textbook reimbursement program was funded would be assigned directly to nonpublic schools, in proportion to their enrollments, to permit them to acquire secular supplies, equipment and "auxiliary services". The latter were defined in the New Jersey Administrative Code as "nonadministrative services provided by personnel other than regular classroom teachers, school librarians, principals or other supervisory personnel to students whose special needs are not met in a standard or regular school program." These were, typically, remedial and corrective instruction and diagnostic services in reading and mathematics, corrective instruction in speech, adaptive or corrective instruction in physical education, guidance counseling and testing services, and psychological testing and diagnostic services. 358 F. Supp. at 39. Personnel providing such services were required to be employees of the board of education, to be certified by the State Board of Examiners if such certification was required of similar personnel assigned to public schools, and to be under the supervision of the local board of education. *Id.*

The three-judge court struck down the provision in regard to auxiliary services, as it did the other provisions

¹⁰ The Chief Justice, Justice White and Justice Rehnquist would have noted probable jurisdiction and set the case for oral argument.

of New Jersey statute. Responding to defendants' argument that no entangling surveillance would be required because "the processes which would be involved in remedial reading or remedial arithmetic are clearly more peripheral to the possibility of religious indoctrination than the initial teaching of reading and arithmetic", the three-judge court emphasized that "a teacher who teaches reading or remedial reading remains a teacher" and that "[a] teacher's instruction may vary in content or emphasis and is not entirely predictable This being so, it would be necessary to continually review the content of a teacher's instruction in order to see that it adheres to the restrictions imposed by the statute, in that it be confined only to secular and nonideological subject matter." 358 F. Supp. at 40. The court further pointed out that the teachers would "be working in atmospheres dedicated to the rearing of children in a particular religious faith", and that "a constant review of that instruction would be required in order to determine that the religious atmosphere has not caused religion to be reflected—even unintentionally—in the instruction provided by such teachers." *Id.* The court also alluded to the potential-for-political-divisiveness argument which the Chief Justice had elaborated for the first time in *Lemon* and Justice Powell had repeated in *Nyquist*. We forbear further discussion of the summary affirmation in *Marburger* since much of the same ground was to be covered in the Supreme Court decision next discussed.

We come then to *Meek v. Pittenger*, 421 U.S. 349 (1975), the most pertinent to this case of all the Court's Establishment Clause decisions. In Part V of the plurality opinion, written by Justice Stewart for himself, Justice Blackmun and Justice Powell, and concurred in by Justice Brennan for himself, Justice Douglas and Justice

Marshall¹¹ over sharp dissents by Chief Justice Burger and Justice Rehnquist, the latter being joined by Justice White, the Court held unconstitutional a Pennsylvania statute, Act 194, which authorized the Secretary of Education to provide "auxiliary services" to all children enrolled in nonpublic elementary and secondary schools meeting Pennsylvania's compulsory attendance requirements.¹² These included

guidance, counseling and testing services; psychological services; services for exceptional children; speech and hearing services; services for the improvement of the educationally disadvantaged (such as, but not limited to, teaching English as a second language), and such other secular, neutral, nonideological services as are of benefit to nonpublic school children and are presently or hereafter provided for public school children of the Commonwealth.

The teaching and other services were to be provided in the nonpublic schools by personnel drawn from a division of the public school system that had been established to provide similar services to public school children. A divided three-judge district court, *see* 374 F. Supp. 639 (E.D. Pa. 1974), had sustained this against an attack on entanglement grounds on the basis that continuing supervision of the personnel providing auxiliary services would

11 As shown by their votes in *Lemon*, *supra*, 413 U.S. 825, Justice Brennan and his two colleagues would have placed the Part V result of unconstitutionality on broader grounds.

12 *Meek* cannot be distinguished on the basis that the Pennsylvania statute provided auxiliary services only in nonpublic schools—a form of discrimination which all the Justices would surely have stricken down without saying more. The purpose of Act 194 was to provide children in nonpublic schools benefits similar to those already afforded in public schools, *see* 421 U.S. at 352 n.2.

not be necessary to guarantee that a member of the auxiliary-service staff had not "succumb[ed] to sectarianization of his or her professional work", 374 F. Supp. at 657. Justice Stewart began by finding that this was error, *see* 421 U.S. at 369-70, citing *Earley v. DiCenso*, the companion case to *Lemon v. Kurzman, supra*, 403 U.S. 602, which had held that a statute subsidizing the teaching of secular subjects by religious school teachers would "inevitably" require "comprehensive, discriminating, and continuing state surveillance" to insure that instruction would be religiously neutral. Justice Stewart saw no sufficient distinction in the fact that the Act 194 teachers would be dealing with remedial (and occasionally exceptional) students. "[T]he likelihood of inadvertent fostering of religion may be less in a remedial arithmetic class than in a medieval history seminar, but a diminished probability of impermissible conduct is not sufficient: 'The State must be certain, given the Religion Clauses, that subsidized teachers do not inculcate religion' ", 421 U.S. at 370-71 (quoting *Earley v. DiCenso, supra*, 403 U.S. at 619). Even more important for us—indeed dispositive unless affected by a later decision—is the immediately following passage wherein the *Meek* majority refused to recognize any distinction from *Earley* and *Lemon* based on the fact that "the teachers and counselors providing auxiliary services are employees of the public intermediate unit, rather than of the church-related schools in which they work." This "does not substantially eliminate the need for continuing surveillance." While the auxiliary-service personnel were not subject to the discipline of a religious authority, they were "performing important educational services in schools in which education is an integral part of the dominant sectarian mission and in which an atmosphere dedicated to the advance-

ment of religious belief is constantly maintained." It followed that "[t]o be certain that auxiliary teachers remain religiously neutral, as the Constitution demands, the State would have to impose limitations on the activities of auxiliary personnel and then engage in some form of continuing surveillance to ensure that those restrictions were being followed." 421 U.S. at 372. Also noting the potential-for-divisive-conflict theme that had been sounded in *Lemon, supra*, 403 U.S. at 622-23, and repeated in *Nyquist, supra*, 413 U.S. at 794, Justice Stewart concluded that

[t]his potential for political entanglement, together with the administrative entanglement which would be necessary to ensure that auxiliary-services personnel remain strictly neutral and non-ideological when functioning in church-related schools . . . compels the conclusion that Act 194 violated the constitutional prohibition against laws "respecting an establishment of religion."

421 U.S. at 372.¹³

¹³ Just as *Lemon* was to have its *Tilton*, *Nyquist* and *Meek* were to have *Roemer v. Board of Public Works*, 426 U.S. 736 (1976). The Court there sustained a Maryland program of grants to private institutions of higher learning for each full-time student (excluding students enrolled in seminarian or theological academic programs) in an amount equal to 15% of the State's per-full-time-pupil appropriations for students in the state college system. The grant could be used for any purpose except that, as provided by an amendment to the statute, none of the money could be utilized for sectarian purposes. Justice Blackmun, writing for himself, the Chief Justice and Justice Powell, thought that *Lemon*'s primary effect test of was met by the district court's finding that the four colleges at issue were not "pervasively sectarian", 387 F. Supp. at 1293. This, in turn, was based on a number of subsidiary findings, summarized at 426 U.S. 755-58, which he declined to characterize as clearly erroneous. 426 U.S. at 758. He expected that in using the grant the colleges "will give a wide berth to 'specifically religious activity,' and thus minimize constitutional questions" regarding the advancement of religion. 426 U.S. at 760-61

The last of the four cases relating to government funding of auxiliary services for parochial school students

(footnote omitted). Justice Blackmun had more difficulty with the entanglement hurdle. He surmounted this on three bases set forth at 426 U.S. 762-66. What he found "most impressive" in distinguishing *Lemon* was the following, 426 U.S. at 764-65:

The elementary and secondary schooling in *Lemon I* came at an impressionable age; the aided schools were "under the general supervision" of the Roman Catholic diocese; each school had a local Catholic parish that assumed "ultimate financial responsibility" for it; the principals of the schools were usually appointed by church authorities; religion "pervade[d] the school system"; teachers were specifically instructed by the "Handbook of School Regulations" that "'[r]eligious formation is not confined to formal courses; nor is it restricted to a single subject area.'" 403 U.S., at 617-618. These things made impossible what is crucial to a nonentangling aid program: the ability of the State to identify and subsidize separate secular functions carried out at the school, without on-the-site inspections being necessary to prevent diversion of the funds to sectarian purposes.

Justices White and Rehnquist furnished the majority by reiterating and amplifying the views expressed in the former's dissent in *Lemon* and the latter's dissent in *Meek*. Justices Brennan and Marshall dissented on the grounds set forth in the former's separate opinion in *Lemon*. Justice Stewart's dissent made particular point of the fact that theology courses were a compulsory part of the curriculum and that the findings of the district court with respect to the nature of the instruction in those courses differed radically from those in *Tilton*, and the noncategorical nature of the grants; he also agreed with the views of Justices Brennan and Stevens. 426 U.S. at 773-75. The latter's dissent expressed agreement with Justice Brennan's views; he "would add emphasis to the pernicious tendency of a state subsidy to tempt religious schools to compromise their religious mission without wholly abandoning it." 426 U.S. at 775.

For our purposes the most important thing about *Roemer* is Justice Blackmun's reaffirmation and explication of *Meek*. Referring to the portion of that opinion relating to "auxiliary services" ("remedial instruction, counseling and testing, and speech and hearing therapy"), he said, 426 U.S. at 754:

These also were intended to be neutral and nonideological, and in fact were to be provided by public school teachers. Still, there was danger that the teachers, in such a sectarian setting, would allow religion to seep into their instruction. To attempt to prevent this from happening would excessively entangle the State in church affairs. The Court referred again to the danger of political divisiveness, heightened, as it had been in *Lemon I* and *Nyquist*, by the

is *Wolman v. Walter*, 433 U.S. 229 (1977). This dealt with an Ohio statute, Ohio Rev. Code Ann. § 3317.06 (Supp. 1976), providing a variety of forms of state aid to non-public elementary and secondary schools, most of which were sectarian. The statute was enacted after the decision in *Meek v. Pittenger* and was "obviously . . . an attempt to conform to the teachings of that decision", as the state acknowledged, 443 U.S. at 233. Our concern is with two portions of the Ohio law. Sections 3317.06 (D) and (F) authorized expenditure of state funds to supply speech and hearing diagnostic services and diagnostic psychological services to pupils attending nonpublic schools within the district, all to be provided in the nonpublic school by employees of the local board of education, or a physician hired thereby, with any treatment to take place off the nonpublic school premises. Sections 3317.06 (G), (H), (I) and (K) authorized expenditure of funds for certain therapeutic, guidance, and remedial services to help non-public school students who had been identified as needing specialized attention. These services were to be performed only in public schools, in public centers, or in mobile units located off the nonpublic school premises.

Taking first the on-premises diagnostic services, Justice Blackmun began by agreeing with the finding of the district court that the danger that the diagnostic speech and hearing staff or the psychological diagnostician might

necessity of annual legislative reconsideration of the aid appropriation. 421 U.S., at 372.

He added, *id.*:

So the slate we write on is anything but clean. Instead, there is little room for further refinement of the principles governing public aid to church-affiliated private schools. Our purpose is not to unsettle those principles, so recently reaffirmed, see *Meek v. Pittenger, supra*, or to expand them substantially, but merely to insure that they are faithfully applied in this case.

engage in the impermissible inculcation of religion was "insubstantial". 433 U.S. at 242. He perceived no sufficient basis for distinguishing these diagnostic services from the portions of the statute funding physician's, nursing, dental and optometric services in nonpublic schools—services of the sort that the Court had approved in *Lemon, supra*, 403 U.S. at 616-17, and which the *Wolman* plaintiffs had not challenged. He recognized the binding authority of *Meek* but distinguished the role of the diagnostician from that of the teacher or guidance counselor in that it "does not provide the same opportunity for the transmission of sectarian views as attends the relationship between teacher and student or that between counselor and student." 433 U.S. at 244.

The plaintiffs' attack on the portions of the statute funding off-premises therapeutic services was limited to the situation in which such services were not provided to public and nonpublic school students simultaneously. This, plaintiffs contended, created a risk that sectarian pupils might be isolated and the public employees tempted to "tailor [their] approach to reflect and reinforce the ideological view of the sectarian school attended by the children", thereby directly aiding the sectarian institution. 433 U.S. at 246. Justice Blackmun answered by construing the statute, as had the district court, "to authorize services only on sites that are 'neither physically nor educationally identified with the functions of the nonpublic school'", with the result that "the services are to be offered under circumstances that reflect their religious neutrality", 433 U.S. at 246-47—precisely the opposite of the situation here presented. He conceded that *Meek* had "acknowledged the danger that publicly employed personnel who provide services analogous to those at issue here might transmit religious instruction and

advance religious beliefs in their activities." But he noted that the Court had emphasized in *Meek*

that this danger arose from the fact that the services were performed in the pervasively sectarian atmosphere of the church-related school The danger existed there, not because the public employee was likely deliberately to subvert his task to the service of religion, but rather because the pressures of the environment might alter his behavior from its normal course.

433 U.S. at 247. Accordingly, he held that "[s]o long as these types of services are offered at truly religiously neutral locations, the danger perceived in *Meek* does not arise", even when the students are exclusively sectarian pupils, since "[t]he influence on a therapist's behavior that is exerted by the fact that he serves a sectarian pupil is qualitatively different from the influence of the pervasive atmosphere of a religious institution." *Id.* He added that there would be no excessive entanglement since "[i]t can hardly be said that the supervision of public employees performing public functions *on public property* creates an excessive entanglement between church and state." 433 U.S. at 248 (emphasis supplied).

Justice Blackmun's defense of the diagnostic and therapeutic provisions of the statute occupied, respectively, Parts V and VI of his opinion. The Chief Justice and Justices Stewart, Marshall, Powell and Stevens joined in Part V, relating to diagnostic services; the Chief Justice and Justices Stewart, Powell and Stevens joined in Part VI, relating to therapeutic services.¹⁴ Justices White and

¹⁴ Justice Powell, concurring in these and other points of Justice Blackmun's opinion, filed a statement recognizing that "[o]ur decisions in this troubling area draw lines that often must seem arbitrary".

Rehnquist concurred in the judgment in these parts for the reasons stated by the former in *Nyquist* and by the latter in *Meek*. Justice Marshall would have denied the attack on diagnostic but would have sustained that on therapeutic services; Justice Brennan would have sustained the attacks on both. Hence there were five Justices who upheld government funding of therapeutic services for parochial school students only if these were provided in public facilities, and two who would have found even that to violate the Establishment Clause.

This analysis of the Court's decisions concerning public aid to religious school leads inescapably to the conclusion that public funds can be used to afford remedial instruction or related counseling services to students in religious elementary and secondary schools only if such instruction or services are afforded at a neutral site off the premises

but adding that any loss of analytical tidiness seemed "entirely tolerable" in view of "the positive contributions of sectarian schools" and what he deemed the lessened dangers of "significant religious or denominational control over our democratic processes—or even of deep political division along religious lines. . . ." He characterized the Court's decisions as having "sought to establish principles that preserve the cherished safeguards of the Establishment Clause without resort to blind absolutism" and thought that "[m]ost of the Court's decision today", including Parts V and VI, "follows in that tradition." 433 U.S. at 262-63. We thus cannot subscribe to appellees' contention that Justice Powell was departing from the position he had taken in *Meek*.

Justice Stevens dissented from portions of the opinion that had sustained various parts of the statute. He expressed preference for abandoning the three-part test of *Lemon* and returning to Justice Black's shorter formulation in *Everson*, *supra*, 330 U.S. at 16. He conceded, however, that "[t]he State can plainly provide public health services to children attending nonpublic schools", and thought that "[t]he diagnostic and therapeutic services described in Parts V and VI of the Court's opinion may fall into this category". Hence, although having "some misgivings", he was "not prepared to hold this part of the statute invalid on its face." 433 U.S. at 266. Of course, the therapeutic services described in Part VI of the opinion were to be furnished only on public premises.

of the religious school. The Supreme Court's Establishment Clause jurisprudence from *Everson* to *Wolman* has been entirely consistent on the point that whatever forms of state aid may be given to religious elementary and secondary schools, these must not create a risk, sufficiently significant to require policing, that public school personnel will act, even unwittingly, to foster religion. Teachers and those who provide clinical and guidance services of the sort here at issue are engaged in occupations in which the performance of one's duties may be subtly and all too easily influenced by a sectarian milieu.¹⁵ To be sufficiently certain that public employees, in a program like the present one, will maintain strict religious neutrality, they and the institutions in which they work must be subjected to "comprehensive, discriminating and continuing state surveillance", *Lemon v. Kurtzman, supra*, 403 U.S. at 619. This itself is a constitutionally excessive entanglement of church and state.¹⁶

¹⁵ It is in the nature of ideological influence that it need not always involve the conscious participation of the person influenced. Accordingly, the recognition of the risk that teachers and other professionals will be affected by a sectarian milieu, expressed in *Meek* and in *Wolman*, does not presuppose "bad faith" on their part but simply fallibility and the consequent need for constant monitoring with its attendant entanglement. The statement in *Committee for Public Education & Religious Liberty v. Regan, supra*, 444 U.S. at 660-61, that the Court was unprepared to presume bad faith in order to find excessive entanglement therefore does not aid appellees. Moreover, the Court's statement of entanglement in *Regan* was in the context of a reimbursement program which it characterized as "straightforward and susceptible to . . . routinization", *id.*—a phrase that hardly describes the roles of teachers and other professionals under Title I.

¹⁶ The majority of the three-judge district court in *Meek* stated that, "[s]ignificantly, in no educational expenditure case decided on entanglement grounds has the Court ruled that the statute in question was facially unconstitutional . . .", and that "a decision on the entanglement criterion will in most if not all cases require a factual inquiry rather than a resort to examination of the face of the statute in

2) *Appellees' attempted distinction based on the working of New York City's plan*

Appellees' principal basis for urging us to sustain the validity of the program here at issue is that the position taken by the Court in *Meek*, as reaffirmed and refined in *Wolman*, must yield to the considerable evidence concerning the actual working of the City's provision of on-premises remedial instruction and guidance services. Analysis will show that this evidence, even if taken at face value, goes mainly to appellees' contention that New York City's plan has not advanced religion, and a complete and sufficient answer, as already pointed out, is that *Meek* did not rest on a conclusion that Act 194 had actually fostered religion but rather on a conclusion that, in order

issue or to judicial notice about how it may be expected to operate." 374 F. Supp. 639, 650-51 (E.D. Pa. 1974). The Supreme Court, however, belied the district court's expectations. As stated by Justice Stewart, Pennsylvania's Act 194 was invalid because the state, "to be certain that auxiliary teachers remain religiously neutral, as the Constitution demands, . . . would have to impose limitations on the activities of auxiliary personnel and then engage in some form of continuing surveillance to ensure that these restrictions were being followed." 421 U.S. at 372 (emphasis supplied; footnote omitted). This also answers the argument of the district judge in this case that the precedential weight of *Meek* is limited by the fact that the Court there struck down Act 194 soon after enactment, without a record concerning its actual operations like the extensive one here assembled. When the Court invalidates a program on account of "facial" unconstitutionality, as it in effect did in *Meek*, its decision rests on "the conclusion that the statute [can] never be applied in a valid manner", *City Council of Los Angeles v. Taxpayers for Vincent*, 52 U.S.L.W. 4594, 4597 (U.S. May 15, 1984) (emphasis supplied). The *Meek* Court was aware that programs having safeguards like the City's could be devised and might prove sufficient to prevent teachers and counselors from fostering religion; indeed the possibility of such programs had been suggested by Judge Gibbons writing for the majority of the three-judge court, see 374 F. Supp. at 657. The defect which the Court found fatal in *Meek* was not that Pennsylvania had not imposed supervision and other safeguards like New York City's, but that it would have to do precisely that and would thereby violate the entanglement principle.

to be sure that it would not, Pennsylvania would be required to monitor its operation so closely as to violate the entanglement test, and we place our decision on that ground without need to decide whether New York City's program fails *Lemon's* "primary effect" test. However, in the interest of completeness and in deference to the three-judge court in *PEARL* and the district judge here, we shall state other reasons for finding appellees' argument to be flawed.

First, as regards their contention that Title I has not fostered religion, appellees experience the difficulty always confronted by one having to prove a negative. Even if the evidence were still more extensive than it is, it could not dispel the possibility that in some significant number of instances a public school teacher has succumbed to, or indeed embraced, the religious influences that bear on anyone offering instruction or guidance in rooms that are part and parcel of a religious school, although religious symbols and artifacts have been removed therefrom.¹⁷ The force of this consideration is heightened by the lack of any incentive for complaint. The nonpublic schools, which had to apply for Title I assistance, are happy to have it, even, perhaps all the more, if an occasional teacher or counselor has strayed into religious paths. Similar considerations apply to the students; they have chosen to have, or at least have become used to having, some degree of religious content in their instruction, and are unlikely to notice or to complain if some of this should find its way into the remedial classroom or counseling center. The same considerations apply to the

¹⁷ In fact there can be no assurance that this is always done; at least when a room has not been permanently reserved for the public school teacher, there is always the possibility of a slip.

parents. Teachers and counselors will not complain of their own conduct even assuming they recognize, as they may not always do, that they have crossed the line. The visits of the Title I supervisors are sporadic and, while unannounced, are not unnoticed. Moreover, these visits do not disclose what goes on in the frequent contacts between the regular and the remedial teachers (or other professionals), in which each side reports on individual student needs, problems encountered, and results achieved. All these conferences are held in the religious school—just where does not clearly appear—and it is practically inconceivable that the general atmosphere of the school should not enter into them in any degree.¹⁸ Greater certainty that these opportunities for influence will not lead to public employees' acting so as to foster religion can be achieved only by still greater supervision, but this would mean greater entanglement. This is the very point of the discussion in *Meek*, 421 U.S. at 369-70. Earlier decisions, notably *Earley v. DiCenso, supra*, had made it clear that, because “[t]he State must be *certain*, given the Religion Clauses, that subsidized teachers do not inculcate religion . . .”, 403 U.S. at 619 (emphasis supplied), reliance could not be placed simply “on the good faith and professionalism of the secular teachers and counselors functioning in church-related schools”, *Meek*, 421 U.S. at 369. Accordingly, there must be the active and extensive surveillance which the City has provided, and, under *Meek*, this very surveillance constitutes excessive entanglement even if it has succeeded in preventing the fostering of religion.

¹⁸ Plaintiffs-appellants point out that one of the evaluations of the City's plan said that “[a] team approach was used” in the discussion of individual cases. Joint Appendix at 274.

Second, in resisting the charge that Title I has led, or may lead, to a fostering of religion, the appellees' arguments too often invoke "mosts" and averages. Thus, we are told that there is little risk because 78% of all Title I teachers and other professionals spent less than five days a week in the same public school and worked in more than one. From the perspective of the Establishment Clause, however, it is more important that 22% did work five days a week in the same school, thereby becoming regular components of the religious school's teaching complement, with the special vulnerability to religious influence that this entails. We are likewise unmoved by the statistic that children in 180 of the 231 nonpublic schools receiving Title I services got them from itinerant teachers or professionals. The more significant statistic is that children in 51 nonpublic schools received remedial instruction from public school teachers who were regularly in such schools. Similarly, the fact that a large majority of the public school teachers and other professionals work in nonpublic schools with religious affiliations different from their own does not avoid the conclusion that many of them work—some five days a week—in schools having the same religious affiliation, with consequent enhancement of the danger that the religious atmosphere of the school will penetrate into the remedial instruction or other services.¹⁹

¹⁹ It was doubtless for this reason that, as we read *Meek*, the Court renounced the possible distinction suggested but not endorsed in *Wheeler, supra*, 417 U.S. at 426, between a case in which "a former parochial school teacher is paid with Title I funds to teach full time in a parochial school" and one in which "a public school teacher, solely under public control, is sent into a parochial school to teach special remedial courses a few hours a week." A large program will undoubtedly include teachers of both types.

Third, the whole basis of appellees' argument, namely, that no harm has been proved to have been done in the past is a fundamentally wrong approach to the problem of public aid to religious schools. There is no guarantee that what seems to have been an enlightened approach by the City and the Board to the administration of its plan for sending public school personnel into religious schools will continue. Yet taxpayers like these plaintiffs, who are interested in the preservation of the Establishment Clause and on whom and whose organizations the burden of enforcement in cases like these largely rests, cannot reasonably be expected to mount perpetual guard. In our view, the Court has been wise in relying upon its reasoned apprehension of potentials rather than sanctioning case-by-case determinations of the precise level of risk of fostering religion, since such an empirical approach would inevitably lead to increased litigation in an area where some degree of certainty is needed to prevent constant controversy. Justice Blackmun may have been unduly sanguine when he stated in *Roemer, supra*, 426 U.S. at 754, that "there is little room for further refinement of the principles governing public aid to church-affiliated public schools." But there could be no greater step away from the goal of reasonable certainty than to adopt a rule that the validity of a program should hinge on its precise workings from year to year.

Fourth, any breach of the principle of *Meek* that the line is to be drawn at sending public school teachers and other professionals into religious schools could have consequences going far beyond the program at issue here. We see no principled basis for limiting the position urged by appellees to remedial instruction or clinical and guidance services. One can readily think of other subjects—ranging

from chemistry, physics, and mathematics to physical education and arts and crafts—where it would be easy to devise courses as free of any obvious religious features as the types of instruction here involved, and whose delegation to public school teachers would not significantly affect the religious mission of the schools in the areas which they reserved for their own teachers.²⁰ The pressure to exploit this possibility would be immense. Apart from political considerations, the Court has long recognized that a combination of the understandable feelings of parents who are taxed to support the public schools, yet are forced by their religious convictions also to pay to send their children to religious schools, *cf. Lemon*, 403 U.S. at 622, and the fear of increased burden on the fisc if the religious schools should close, *cf. Nyquist*, 413 U.S. at 797, would produce unremitting efforts to exploit any hole that had been opened. To relax *Meek*'s ban on sending public school teachers and counselors into religious schools, a ban later recognized in *Roemer* and *Wolman*, on the basis of a demonstration that this has not advanced religion in the New York City schools, would let the genie out of the bottle.²¹ Considerable segments of the

²⁰ We also see no principled basis for limitation in the facts that the programs here at issue are aimed at poor students and are available only when the school does not offer them—the latter of which any school could readily overcome. But even if such limitations had a principled basis under the Establishment Clause that we do not perceive, the potential for expansion would still be great.

²¹ Compare, in this connection, the "Shared Time" program described in *Americans United for Separation of Church & State v. School District of Grand Rapids*, 718 F.2d 1389 (6 Cir. 1983). Under Grand Rapids' program, the public school district leased classroom space in parochial schools for the purpose of offering courses from its general curriculum to nonpublic school students during regular school hours. Course titles included "Humanities, Language Arts, Home Economics, Science, Spanish, French, Latin, Business, Social Studies, Yearbook,

curriculum of the religious schools could be turned over to public school teachers, working in classrooms denuded of religious symbols and with "state inspectors prowling the halls of parochial schools and auditing classroom instruction," *Lemon v. Kurtzman*, 403 U.S. at 650 (opinion of Brennan, J.). It will not do to say that such an outcome cannot occur "while this Court sits", *Panhandle Oil Co. v. Mississippi ex rel. Knox*, 277 U.S. 218, 223 (1928) (Holmes, J., dissenting), unless there is a principled basis on which the Court can impose a limit. The Court has thus wisely decided, as we read its cases, that whatever the situation may be with respect to other forms of government aid, no part of the teaching or counseling function in parochial schools can be performed by public school employees, whether under a good plan, a bad plan, or no plan at all.

Fifth, appellees' arguments ignore the symbolic significance of the regular appearance of public school teachers in religious schools. More than twenty years ago, the Court elucidated the "neutrality" test toward religion as stemming "from a recognition of the teachings of history that powerful sects or groups might bring about a fusion of governmental and religious functions or a concert or dependency of one upon the other to the end that official support of the State or Federal Government would be placed behind the tenets of one or of all orthodoxies." *Abington School District v. Schempp*, 374 U.S. 203, 222 (1963). Quite recently the Court has said, "the mere appearance of a joint exercise of legislative authority by

Calculus, Creative Writing, Psychology, Journalism, Criminology, and Advanced Biology." 718 F.2d at 1392. The Sixth Circuit invalidated the program as violating the Establishment Clause; the Supreme Court has granted certiorari, 52 U.S.L.W. 3631 (Feb. 27, 1984).

Church and State provides a significant symbolic benefit to religion in the minds of some by reason of the power conferred." *Larkin v. Grendel's Den, Inc.*, 74 L. Ed. 2d 297, 306 (1982). Under the City's plan public school teachers are, so far as appearance is concerned, a regular adjunct of the religious school. They pace the same halls, use classrooms in the same building, teach the same students, and confer with the teachers hired by the religious schools, many of them members of religious orders. The religious school appears to the public as a joint enterprise staffed with some teachers paid by its religious sponsor and others by the public. Although the degree of public participation may thus far be minor, the potential for expansion is there.

3) *Appellees' argument that the City's religious schools are not predominantly religious*

Another distinction sought to be drawn by appellees is that the religious schools here in question are not of the same sort as those in *Meek*. In order to prevail on the entanglement issue on this basis, appellees would have to sustain the position that the schools are so nearly secular that significant surveillance is not required. No such position can be sustained.

The argument takes off from the fact that the complaint in *Meek* alleged that the schools there in question were of the sort described in the margin.²² It is then

²² [S]chools which (1) are controlled by churches or religious organizations, (2) have as their purpose the teaching, propagation and promotion of a particular religious faith, (3) conduct their operations, curriculums and programs to fulfill that purpose, (4) impose religious restrictions on admissions, (5) require attendance at instruction in theology and religious doctrine, (6) require attendance at participation in religious worship, (7) are an integral part of the religious mission of the sponsoring church, (8) have as a substantial

urged, on the basis of affidavits of the Reverend Monsignor John J. Healy, Secretary of Education and Director of the Department of Education of the Roman Catholic Archdiocese of New York, the Reverend Vincent D. Breen, Superintendent of Education of the Roman Catholic Diocese of Brooklyn, the principals of two Hebrew day schools, and 42 public school teachers and other professionals working in parochial schools, that the schools here in question do not have all these characteristics. In effect appellees argue that all the religious schools here in question are like the four colleges in *Roemer*, *supra* note 13. The effort fails on both the facts and the law.

With respect to the facts, we take the affidavit of Monsignor Healy as making the most complete statement of appellees' position. Although the affidavit is persuasive that many, perhaps most, of the schools in the Archdiocese of New York receiving Title I assistance do not exhibit *all* the characteristics listed in the *Meek* complaint, a careful reading discloses that many of the schools have many of the characteristics and some may have all. Indeed, the picture that emerges is of a system in which religious considerations play a key role in the selection of students and teachers, and which has as its substantial purpose the inculcation of religious values.²³

or dominant purpose the inculcation of religious values, (9) impose religious restrictions on faculty appointments, and (10) impose religious restrictions on what the faculty may teach.

421 U.S. at 356. See also the rather similar list in the opinion of the three-judge court quoted in *Nyquist*, *supra*, 413 U.S. at 767-68.

²³ While Monsignor Healy denied that the Title I Catholic and elementary schools in the Archdiocese impose religious restrictions on admissions, he conceded that in 41 schools receiving funds from the Archdiocesan Commission for Inter-Parish Financing, 90% of which are Title I schools, 84% of the students are Catholic. No claim was

As for the law, *Meek v. Pittenger* did not rest on a finding that the Pennsylvania religious schools possessed

made that this simply reflected the religious proportion of the neighborhood. It reflected two other factors as well: the desires of Catholic parents and the preference in admissions given to their children. Similarly, although teachers are not restricted to Catholics, the most that Monsignor Healy could say by way of quantification was that "an inquiry of a random sample of Title I schools revealed that 15 non-Catholics were teaching in the schools contacted" out of an unstated number of total teaching positions, and that this was not the total number of non-Catholic teachers. Monsignor Healy also stated that 20% of a total of 359 lay teachers (no figures were given as to the non-lay teachers, who are members of religious orders) employed by Archdiocesan high schools are not Catholic. These figures show exactly what would be expected—that the regular teachers are overwhelmingly Catholics.

Monsignor Healy conceded that "[a] concern for religion and religious values has always been central to the Catholic philosophy of education" and that "the concern for religion and religious values . . . is central to the philosophy of Catholic schools", although he maintained that this "in no way dilutes or distorts the content of what would be considered secular, as opposed to religious education courses." The religious education in the schools "reflects a concern that students receive, in their normal educational setting, an exposure to the teachings of the Roman Catholic Church and Christianity in general," although it was asserted that none of the schools "compel[s]" its students to believe anything. Noting that the New York Catholic schools in *Nyquist* and *Levitt*, which, after all, included the very ones here involved, were said to have "as a substantial purpose the inculcation of religious values", *Nyquist*, 413 U.S. at 768, he objected to the connotation in the word "inculcate", which, in his view, suggested "an effort to induce students to accept ideas or values through coercion". He admitted, however, that "[o]ur schools have as a central concern that students be aware of Catholic values", although he added that students were intended to "examine these values critically." "The emphasis in the religious education classes in the overwhelming majority of the schools . . . is on the teachings of Christianity as the Roman Catholic Church formulates them," although "[n]o effort is made in the religious education courses . . . to compel any student to accept as valid or to adhere to the beliefs of the Roman Catholic Church" (emphasis supplied). The Archdiocesan schools require the attendance of pupils at "religious activities." These typically consist of a prayer at the beginning or end of the school day, but, "[i]n addition, during regular school hours on an occasional basis most schools will schedule more formal liturgical observances, such as attendance at Mass by a class or the entire school." While we thus accept Monsignor Healy's statement that the schools of the Archdiocese do not "compel obe-

all the characteristics alleged in the complaint. The divided three-judge court held the Pennsylvania programs to be valid even if all these allegations were true and therefore made no findings whether they were or not. The portion of Justice Stewart's opinion holding unconstitutional the provision in Act 195 for the loan of instructional materials and equipment referred to the "predominant[ly] sectarian character" of the nonpublic schools, "the primary, religion-oriented educational function of the sectarian school[s]", and "the predominantly religious role performed by *many* of Pennsylvania's church-related elementary and secondary schools", 421 U.S. at 364-65 (emphasis supplied). He also observed that "[t]he very purpose of many of those schools is to provide an integrated secular and religious education; the teaching process is, to a large extent, devoted to the inculcation of religious values and belief", 421 U.S. at 366, and quoted with approval Justice Brennan's statement in *Lemon*, 403 U.S. at 616-17 (concurring opinion), that "the secular education those schools provide goes hand in hand with the religious mission that is the only reason for the schools' existence." A fair case could therefore be made, on the record before us, that government funding of the City's Title I program constitutes a direct and substantial

dience to the doctrines and dogmas of the Roman Catholic Church" or otherwise "seek to coerce the conscience", this is by no means inconsistent with their having as their substantial purpose the "inculcation" of religious values, *see Nyquist, supra*, 413 U.S. at 768. To say that the schools "inculcate" such values is only to say that they earnestly seek to instill or implant them—which need not imply coercion. Cf. Webster's New International Dictionary 1261 (2d ed. 1959) (inculcate: "[t]o teach and impress by frequent repetitions or admonitions"). The fact that New York's Catholic schools do not try to compel students to espouse a particular creed hardly removes them from the class of institutions maintaining "an atmosphere dedicated to the advancement of religious belief", *Meek v. Pittenger, supra*, 421 U.S. at 371.

advancement of religious activity under the portion of *Meek* dealing with the loan of instructional materials and supplies.

However, as stated above, we need not go so far. When the Court struck down Act 194, relating to state provision of "auxiliary services", it relied on entanglement grounds. What mattered, therefore, was the risk that public employees would consciously or unconsciously foster religion, and the entangling prophylaxis that efforts to prevent this would entail. Hence it was enough that the teachers and other professionals employed under Act 194 were "performing educational services in schools in which education is an integral part of the dominant sectarian mission and in which an atmosphere dedicated to the advancement of religious belief is constantly maintained." 421 U.S. at 371. The facts (as opposed to the conclusions) presented in the affidavits offered by appellees bring the religious schools here at issue well within this characterization. It may be that the degree of sectarianism in Catholic schools in, for example, black neighborhoods, with considerable proportions of non-Catholic pupils and teachers, is relatively low; by the same token, in other schools it may be relatively high. Yet, as previously said, enforcement of the Establishment Clause does not rest on means or medians. If any significant number of the Title I schools create the risks described in *Meek*, *Meek* applies. It would be simply incredible, and the affidavits do not aver, that all, or almost all, New York City's parochial schools receiving Title I aid have, in Justice Brennan's words in *Lemon*, *supra*, abandoned "the religious mission that is the only reason for the schools' existence."

Beyond this, the kind of inquiry suggested by appellees is neither possible nor permissible. There is no indication that the City has ever made any inquiry into the precise

degree of religiosity of each of the religious schools into which Title I personnel are sent and it would be expecting altogether too much of these six plaintiffs or their counterparts in a subsequent case to do so. Furthermore, conditions change. One archbishop of New York or bishop of Brooklyn may be content to maintain an atmosphere only moderately dedicated to the advancement of religious belief; his successor may require more. For the City to maintain a constant watch on the religious content of the schools would constitute another aspect of the "entanglement" which the Establishment Clause forbids.

We recognize that the picture of the schools' secular character painted in the affidavits bears some resemblance to that of the religiously affiliated colleges that figured in *Roemer v. Maryland Public Works Board*, *supra* note 13, 426 U.S. 736, 755-56. The similarity, however, is far from complete, as a comparison with the schools described by Monsignor Healy makes clear. Although the Court held that they were not "pervasively sectarian" for purpose of *Lemon*'s "primary effect" test, none of the four colleges in *Roemer* received funds from or made reports to the Catholic church; here some of the Catholic schools do receive such funds and all are under the supervision of the diocese. In *Roemer* attendance at Catholic religious exercises was not required; here it is. In *Roemer* there was no "actual college policy" of beginning the classes with prayer; here there is a uniform practice of beginning or ending the school day or a particular class with prayer. In *Roemer* the student bodies were "chosen without regard to religion"; here Catholics are preferred. Still more important are the differentiating factors with respect to entanglement. Here, as in *Lemon* but not in *Roemer*, we are dealing with elementary and

secondary schooling; the aided schools are under the general supervision of the Roman Catholic diocese; and each school has a local Catholic parish that assumes ultimate financial responsibility for it. According to the *Roemer* Court, these and other factors make "impossible what is crucial to nonentangling aid programs: the ability of the State to identify and subsidize separate secular functions carried out at the school, without on-the-site inspections being necessary to prevent diversion of the funds to sectarian purposes", 426 U.S. at 765. See also *Tilton v. Richardson, supra*, 403 U.S. 672, 687 (finding only "minimal", nonentangling surveillance necessary in case of sectarian colleges which did not have religious indoctrination as their substantial purpose).

4) Other arguments

Finally we shall deal briefly with other arguments made by appellees, although the short answer to all of them is that they bear on the question of "primary effect", not on the entanglement issue which was central to the Court's decision in *Meek* and to our decision here.

Referring to the mention in many Supreme Court cases of a statute's benefitting a broad class of persons, appellees emphasize that the aid here in question is offered not simply to religious schools but to all schools and to many pupils, the great majority of them in the public schools. But in *Meek*, too, the plan in question benefitted a broad class of persons. As previously pointed out, Act 194 provided auxiliary services in nonpublic elementary and secondary schools, which services were to be of the same nature as those provided in the public schools. In any event, it cannot be of constitutional significance whether the state provides services in private schools to cover a type of expense already met in the general program of the

public schools or, as under Title I, provides services in both public and nonpublic schools.²⁴

A second argument is that the Title I program affords aid to the children rather than the schools. This is subject to three answers, any one of them sufficient. The first is that the same argument could have been made in *Meek*. The second is that the aid here, to wit, the provision of teachers and other professionals, is furnished to the school on its application, although the ultimate beneficiary may be the student. The third is what the Court said in *Nyquist*, *supra*, 413 U.S. at 785-86, and in *Wolman*, *supra*, 433 U.S. at 250.

Finally, appellees, particularly relying on the recent decision in *Lynch v. Donnelly*, 52 U.S.L.W. 4317 (U.S. March 5, 1984), argue that Title I involves no unconstitutional advancement of religion because the Government's assuming the burden of remedial instruction in religious schools is only "indirect", "remote" or "incidental" advancement. But this argument again ignores that *Meek* did not rely on the second prong of the *Lemon* test, to wit, benefit to religion, but on the third, excessive entanglement.

²⁴ Appellees argue that the difference may be of constitutional significance in one respect, namely, the political divisiveness point first adumbrated by the Chief Justice in *Lemon*. Whereas in *Meek* there would be an annual battle over Pennsylvania's aiding the religious schools, here the aid is a small part of the aid afforded by Title I to both public and nonpublic schools throughout the United States, which in turn is a small part of the budget of the Department of Education. However, as we read *Meek*, the political strife argument was simply an additional consideration to bolster a conclusion already reached on other grounds, see 421 U.S. at 372. Cf. *Mueller v. Allen*, 77 L.Ed.2d 721, 733 n.11 (1983) (indicating political entanglement test is "confined to cases where direct financial subsidies are paid to parochial schools or to teachers in parochial schools"); *Lynch v. Donnelly*, 52 U.S.L.W. 4317, 4321 (U.S. March 5, 1984) ("This case does not involve a direct subsidy to church-sponsored schools or colleges, or other religious institutions, and hence no inquiry into political divisiveness is even called for . . .").

CONCLUSION

As said by then District Judge Higginbotham, dissenting from the portion of the decision of the three-judge court in *Meek v. Pittenger, supra*, 374 F. Supp. 639, 663, which affirmed the constitutionality of Pennsylvania's provision of auxiliary services in religious schools, "there is a tugging appeal to one's humanitarian feelings and interest over the difficulties which will confront non-public schools" if New York City's long-standing plan for implementing Title I by sending remedial teachers and counselors into religious schools is invalidated. These schools may well be unwilling or unable to pay for such auxiliary services with their own resources. While other ways of using Title I funds for the benefit of students in religious schools can be found, these, as shown in *Wolman*, are almost certain to be less effective, more costly, or both. This is a hard case, and hard cases, like great cases, as Justice Holmes reminded us in *Northern Securities Company v. United States*, 193 U.S. 197, 400-01 (1904) (dissenting opinion), can make bad law. We fully understand and appreciate why the three-judge court in *PEARL* and the district judge here struggled to find constitutional justification for a program that apparently has done so much good and little, if any, detectable harm.

However, efficiency was not the objective of the framers of the Bill of Rights; they aimed to restrain government from certain acts which legislative majorities had determined to be wise. See *Stanley v. Illinois*, 405 U.S. 645, 656 (1972) ("But the Constitution recognizes higher values than speed and efficiency."). Our task here, while difficult, is easier than was Judge Higginbotham's. He wrote before the Supreme Court had decided *Meek*; we

write thereafter. As we have repeatedly said, nothing in this extensive record shows that the surveillance under New York City's plan is significantly different from that contemplated by the *Meek* Court, and we must reiterate that this portion of *Meek* was decided on the ground of entanglement, not aid to religion. We cannot escape the conviction that, despite the attempted distinctions, appellees are really asking us to say that *Meek* was wrongly decided—that the majority, although expressly addressing the issue, *see* 421 U.S. at 371, did not adequately appreciate the difference between the surveillance of religious school teachers condemned in *Lemon* and the surveillance of public school teachers in religious schools condemned in *Meek*. Whatever the merits of that argument may or may not be, we are nevertheless bound by the *Meek* decision, *see Hutto v. Davis*, 454 U.S. 370, 375 (1982). Moreover, we have identified some considerations beyond those discussed in *Meek* which seem to us to call for its result.²⁵

²⁵ We are not unaware that, as Justice Blackmun avowed in *Committee for Public Education & Religious Liberty v. Regan*, *supra*, 444 U.S. at 663-64 (dissenting opinion), there are deep divisions within the Court with respect to issues such as those here presented and, as appellees have strongly suggested to us, that the composition of the Court has changed since *Meek*. One need not go beyond *Meek* itself to know that three present members of the Court would vote to affirm the judgment of the district court in this case if the issue of sending public school teachers and other professionals into sectarian schools to give remedial instruction and guidance were arising for the first time. It is not appropriate for us to speculate how these three Justices would vote now that *stare decisis* is a factor, *see Arizona v. Rumsey*, 52 U.S.L.W. 4665, 4667 (U.S. May 29, 1984), and cases there cited—and even less so for us to engage in prediction with respect to the others. In the one case known to us where an inferior court has refused to follow a Supreme Court precedent on the basis of prospective nose-counting, *Barnette v. West Virginia Board of Education*, 47 F. Supp. 251, 253 (S.D.W.Va. 1942)—in that instance successfully, *see* 319 U.S. 624 (1943)—the lower court had a solid basis for prediction which we do not. Our task is to analyze the precedents and apply them as best we can: The responsibility for modifying or overruling them, if that is to be done, rests elsewhere.

We therefore reverse the order of the district court granting summary judgment to appellees and direct it to enter judgment granting appellants' cross-motion for a judgment declaring that New York City's plan violates the Establishment Clause and an appropriate injunction. The district court should afford sufficient time for the City to propose and the Secretary to approve an alternative plan. For our part we shall stay the issuance of the mandate until thirty days after the final disposition of any timely petition for rehearing or suggestion for rehearing en banc, in order to enable appellees, if they remain aggrieved, to petition the Supreme Court for certiorari (or, if they should consider this appropriate, to appeal under 28 U.S.C. § 1252), and, if such a petition be filed and/or such an appeal be taken, until the final disposition thereof.

APPENDIX B
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

78 CV 1750
(ERN)

BETTY-LOUISE FELTON, CHARLOTTE GREEN,
BARBARA HRUSKA, MERYL A. SCHWARTZ,
ROBERT H. SIDE AND ALLEN H. ZELON,
PLAINTIFFS,

-against-

SECRETARY, UNITED STATES DEPARTMENT OF
EDUCATION, AND THE CHANCELLOR OF THE
BOARD OF EDUCATION OF THE CITY OF NEW
YORK, DEFENDANTS,

and

YOLANDA AGUILAR, LILLIAN COLON, MIRIAM
MARTINEZ AND BELINDA WILLIAMS,
INTERVENOR-DEFENDANTS.

MEMORANDUM ORDER

This case presents another chapter in the ongoing saga concerning the constitutionality of provisions of Title I of the Elementary and Secondary Education Act of 1965, 20 U.S.C. § 2701, *et seq.* See *Flast v. Cohen*, 392 U.S. 83 (1968). Plaintiff taxpayers seek declaratory and injunctive relief upon the ground that Title I violates the Establishment Clause of the First Amendment to the United States Constitution. The case is before the Court upon cross-motions for summary judgment.

The case was stayed pending the final outcome of *National Coalition for Public Education and Religious*

Liberty v. Harris (PEARL II), 489 F. Supp. 1248 (S.D.N.Y. 1980) (three-judge court), *appeal dismissed*, 449 U.S. 808 (1980). By stipulation of the parties, this case is to be determined upon the trial and record in *PEARL II*.¹ Thus, the Court has before it the exact same facts and evidence which persuaded the three-judge District Court in *PEARL II* to find Title I constitutional upon the basis of the record before it.

This Court has considered the thorough and lengthy unanimous decision of Judge Tenney in *PEARL II* and is of the opinion that it reaches the correct result for the reasons stated therein. Plaintiffs rely heavily upon language in *Meek v. Pittenger*, 421 U.S. 349, 367-73 (1975); however, they do not respond to Judge Tenney's numerous and accurate observations about the factual distinctions between the two cases. Simply put, the relevant equivalent of the extensive evidence derived from the many years of operation of the Title I program in New York City's schools was not before the courts in *Meek*. As a result, the conclusions reached therein were reasonable inferences drawn from the circumstances.

In the case at bar, however, although arguably some of the circumstances of the Title I program parallel the State program in *Meek*, the direct evidence demonstrates that the concerns of the *Meek* Court about the potential for the unconstitutional mingling of government and religion in the administration of this type of program have not materialized. Undoubtedly, the Supreme Court will not ignore the direct evidence of how Title I has functioned and operated in New York City's nonpublic schools for some seventeen (17) years in favor of plaintiffs' conjecture about the possibility of unconsti-

¹ Plaintiffs' memorandum in support of their motion adopts the *PEARL II* court's statement of facts as its own; therefore, there appears to be no dispute about the accuracy of the *PEARL II* court's findings.

tutional governmental activity inherent in the arrangements of this program. Therefore, the Court finds that defendants have sustained their burden of demonstrating that Title I, as administered in the nonpublic schools of New York City, does not offend the Establishment Clause of the First Amendment. Accordingly, defendants' motion for summary judgment is granted, and plaintiffs' motion for summary judgment is denied.

SO ORDERED.

The Clerk of Court is directed to enter judgment in favor of defendants dismissing the complaint. The Clerk is further directed to forward copies of this Memorandum Order to counsel for the parties.

/s/ Edward R. Neaher
U.S.D.J.

Dated: Brooklyn, New York
October 4, 1983

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CV 78-1750 (ERN)

BETTY-LOUISE FELTON, CHARLOTTE GREEN,
BARBARA HRUSKA, MERYL A. SCHWARTZ,
ROBERT H. SIDE AND ALLEN H. ZELON,
PLAINTIFFS,

-against-

SECRETARY, UNITED STATES DEPARTMENT OF
EDUCATION, AND THE CHANCELLOR OF THE
BOARD OF EDUCATION OF THE CITY OF NEW
YORK, DEFENDANTS,

and

YOLANDA AGUILAR, LILLIAN COLON, MIRIAM
MARTINEZ AND BELINDA WILLIAMS,
INTERVENOR-DEFENDANTS

Judgment

Filed Oct. 20, 1983

A memorandum order of Honorable Edward R. Neaher, United States District Judge, having been filed on October 11, 1983, granting defendants' motion for summary judgment, denying plaintiffs' motion for summary judgment, and directing the Clerk of Court to enter judgment in favor of defendants dismissing the complaint, it is

ORDERED and ADJUDGED that the plaintiffs take nothing of the defendants; that the defendants' motion for summary judgment is granted; that the plaintiffs' motion for summary judgment is denied; and that judg-

ment is entered in favor of defendants dismissing the complaint.

/S/ Robert C. Heinemann

ROBERT C. HEINEMANN

Clerk of Court

Dated: Brooklyn, New York
October 17, 1983

APPENDIX C

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

76 Civ. 888 (CHT)

**NATIONAL COALITION FOR PUBLIC
EDUCATION AND RELIGIOUS LIBERTY, ET AL.,
PLAINTIFFS,**

-against-

**PATRICIA R. HARRIS, SECRETARY OF THE UNITED
STATES DEPARTMENT OF HEALTH, EDUCATION AND
WELFARE, ET AL., DEFENDANTS,**

-and-

**JAMES AND BESSIE BOVIS, ET AL.,
INTERVENOR-DEFENDANTS,**

-and-

**PHILIP AND IDA FENSTER, ET AL.,
INTERVENOR-DEFENDANTS.**

OPINION

THREE-JUDGE COURT

**ELLSWORTH A. VAN GRAAFEILAND, C.J.
CHARLES H. TENNEY, D.J.
VINCENT L. BRODERICK, D.J.**

TENNEY, D. J.

The constitutional prohibition against government aid to parochial schools¹ has provoked considerable litiga-

¹ Throughout this opinion the term "parochial school" will be used interchangeably with "nonpublic" or "private school." While the latter, of course, may be either secular or sectarian,

tion resulting in an array of not entirely harmonious judicial decisions.² This Establishment Clause challenge to Title I of the Elementary and Secondary Education Act of 1965, 79 Stat. 27, as amended, 20 U.S.C. §§ 2701 *et seq.* ("Title I"), was launched over twenty years ago and, at that time, culminated in the landmark decision of *Flast v. Cohen*, 392 U.S. 83 (1968). The same day that *Flast* established that a taxpayer had standing to assert this First Amendment claim, the Supreme Court upheld a New York law requiring local public school authorities to lend textbooks free of charge to parochial school students. *Board of Education v. Allen*, 392 U.S. 236 (1968). Confronted with this unfavorable precedent and an apparently unsympathetic Court, the opponents of Title I decided to postpone pursuit of their claim. The legal landscape has now changed and the challenge has been renewed. The National Coalition for Public Education and Religious Liberty ("PEARL") has brought this suit against the Secretary of Health, Education and Welfare, the United States Commissioner of Education, and the Chancellor of the New York City Board of Education to enjoin the allocation and use of Title I funds for the remedial education of parochial school students by public school teachers on the premises of the parochial schools during regular school hours.

Since *Flast* and *Allen* were decided, two developments have occurred that are decisive in the resolution

this opinion is concerned solely with nonpublic schools that are affiliated with a particular religious organization or group. For the sake of brevity, therefore, the religious orientation of a nonpublic or private school will generally be presumed.

² See *Committee for Public Education v. Regan*, 48 U.S.L.W. 4168, 4175 (U.S., February 20, 1980) (Stevens, J., dissenting); *Wolman v. Walter*, 433 U.S. 229, 251 n.18 (1977); *Wheeler v. Barrera*, 417 U.S. 402, 431 (1974) (Douglas, J., dissenting); *Committee for Public Education v. Nyquist*, 413 U.S. 756, 761 n.5 (1973).

of this lawsuit. First, a series of Supreme Court decisions have clarified in part the precise concerns underlying the First Amendment's prohibition against the establishment of religion. Second, New York City has been running Title I programs for about fourteen years and has accumulated an extensive record of operations that can be examined and evaluated. Upon viewing this record in light of the considerations embodied in the Establishment Clause, this Court has concluded that Title I, as interpreted and applied in New York City, does not violate the First Amendment of the Constitution.

Procedural Background

After this lawsuit was filed, the Court granted motions to intervene as defendants that were made by certain parents of children who attend parochial schools in New York and who receive remedial educational assistance under Title I. A three-judge court was convened to hear and decide the case pursuant to 28 U.S.C. § 2282.³

Plaintiffs then moved for summary judgment or, in the alternative, for a preliminary injunction. Relying on *Meek v. Pittenger*, 421 U.S. 349 (1975), and *Public Funds for Public Schools v. Marburger*, 358 F. Supp. 29 (D.N.J.) (three-judge court), *aff'd mem.*, 417 U.S. 961 (1974), discussed *infra*, the plaintiffs asserted that the Supreme Court twice "has faced the constitutional question raised in this case, and in both instances it has ruled the challenged statute unconstitutional on its face." Plaintiffs' Memorandum in Support of Motion for Summary Judgment at 2. The Court denied both motions. *National Coalition for Public Education and*

³ This action was commenced by a complaint filed February 25, 1976 and is therefore unaffected by the repeal of the three-judge court provision. Act of August 12, 1976, Pub. L. No. 94-381, § 7, 90 Stat. 1120.

Religious Liberty v. Califano, 446 F. Supp. 193, 196 (S.D.N.Y. 1978). Not only did the plaintiffs fail to show the threat of irreparable injury that is a prerequisite to preliminary injunctive relief, but, as noted by the Court, an order halting the remedial education program in the middle of the year would work an unwarranted hardship on the defendants and would harm the public interest. *Id.* at 195. The Court also rejected PEARL's summary judgment argument for two reasons.

First, the plaintiffs' challenge is *not* to this statute on its face: rather, they challenge Title I only "insofar as [it] authorizes the expenditure of federal funds to finance educational services within religious schools during school hours." Notice of Motion ¶ 3. The limited nature of this challenge to a particular application of the statute necessarily demands that this Court be fully informed on the exact manner in which these Title I funds are used, in order both that the Court may understand and evaluate the alleged constitutional improprieties of this use of Title I funds and that the Court may shape a suitable injunctive order should such improprieties be found.

Second, as the Supreme Court has noted,

The task of deciding when the Establishment Clause is implicated in the context of parochial school aid has proved to be a delicate one for the Court. Usually it requires a careful evaluation of the facts of the particular case. It would be wholly inappropriate for us to attempt to render an opinion on the First Amendment issue when no specific plan is before us. A federal court does not sit to render a decision on hypothetical facts. . . .

Wheeler v. Barrera, 417 U.S. 402, 426-27, 94 S. Ct. 2274, 2288 (citations omitted). In evaluating a first amendment challenge, a court must examine, *inter alia*, whether "the statute and its administration [avoid] excessive entanglement with reli-

gion." *Meek v. Pittenger, supra*, 421 U.S. at 358, 93 S. Ct. at 1760 (emphasis added). Such an examination is not possible on the current record.

Id. at 196.

An evidentiary hearing was conducted in May 1979. Plaintiffs called only one witness, Dr. John Ellis, Executive Deputy Commissioner for Educational Programs in the United States Office of Education. Plaintiffs' counsel stated that he was seeking to determine how the federal government interprets and administers Title I and proceeded to ask Dr. Ellis a series of primarily hypothetical questions based on prior Supreme Court decisions. Tr. 40-65. Pursuant to an agreement reached at a pretrial conference, the defendants presented the bulk of their case in the form of a narrative summary which was received into evidence. Defendants' Exh. T. This summary synthesized numerous affidavits, Defendants' Exh. U, Tabs A-1 to A-58, and documentary evidence, Defendants' Exhs. A-S, which described the operation of New York City's Title I program in nonpublic schools. The defendants also called seven witnesses who were teachers or administrators in the program.

At the start of the evidentiary hearing, plaintiffs' counsel stated that PEARL had no evidence showing that New York City's Title I program was unconstitutional. Tr. 8. Counsel explained that PEARL had sought to discontinue the suit against the City because "proof of such a [constitutional] violation and the financing of a trial record is beyond our means." *Id.* at 7-8. The City, however, had rejected PEARL's discontinuance offer.⁴ The plaintiffs therefore asked the Court to

⁴ Counsel for New York City stated at the hearing that the City opposed the plaintiffs' "concession of judgment in this case and . . . if we had not been named as a party in this case we would move to intervene." Tr. 37-38. In describing the City's interest in seeing the program continued in its present form,

enter judgment in favor of the City and allow the case to go forward against the two federal officials. The Court did not grant the request and plaintiffs conceded that "there is no violation in respect to any school within the City of New York and we ask no relief against the City of New York." *Id.* at 8.

Towards the end of the hearing, plaintiffs' counsel stated that "[o]ur basic premise is the statute on its face as construed by the Commissioner of Education is unconstitutional irrespective what happens in any school anywhere in the United States." *Id.* at 159. He then agreed with the Court's characterization of PEARL's argument as being "[n]ot that the statute itself is unconstitutional but [that it] is being unconstitutionally interpreted and applied." *Id.* at 60. Plaintiffs' counsel reaffirmed this position at the post-trial oral argument before the three-judge panel, P-Tr. at 17,⁵ and reiterated his view that the case was unaffected by the lack of proof that New York City's Title I program violated the Constitution. *Id.* at 11.

The Court rejects plaintiffs' contention that "the issue in this case is not what is actually done; the issue in this case is what is authorized by the law which we are challenging." *Id.* at 11-12. This assertion is directly contradicted by the admonition of the *Wheeler* Court, quoted above, that a federal court must not issue decisions based on hypothetical situations. *Wheeler v. Barrera, supra*, 417 U.S. at 427. In *Wheeler*, the Supreme Court specifically declined to rule on the constitutionality of a Title I program that provided remedial services on the premises of parochial schools because it would be "wholly inappropriate" to render an opinion "when no specific plan is before us." *Id.* at 426. Obvi-

counsel remarked that "[i]t is not necessary for me to recount the cost to the City of educational deprivation." *Id.* at 38.

⁵ "P-Tr." signifies the transcript of the post-trial oral argument held before this three-judge Court on December 14, 1979.

ously, it would be highly inappropriate for this Court to reject the exhaustive evidence that has been presented on New York City's Title I program and to resolve this suit on the basis of the plaintiffs' evidence about what *could* happen under the law. Accordingly, the factual summary and legal analysis that follows relies on the undisputed evidence submitted on the implementation of Title I in New York City schools. The Court's constitutional ruling is, of course, confined to the fact situation specifically presented here.

FACTUAL BACKGROUND

Title I

Title I was enacted in 1965 to provide federal funding for compensatory educational programs that are administered by local public educational agencies and are directed to educationally deprived children in low-income areas. Recognizing the significant correlation between poverty and learning deficiencies, Congress "declare[d] it to be the policy of the United States to provide financial assistance . . . to local educational agencies serving areas with concentrations of children from low-income families to expand and improve their educational programs by various means . . . which contribute particularly to meeting the special educational needs of educationally deprived children." 20 U.S.C. § 2071, *see* S. Rep. No. 146, 89th Congress, 1st Sess., *reprinted in* [1965] U.S. Code Cong. & Ad. News 1446, 1450. The Act provides for annual congressional appropriations for programs proposed by local educational agencies ("LEA") and approved by state educational agencies. 20 U.S.C. § 2731. All programs are administered solely by the LEA in the particular area and are staffed entirely with the LEA's employees. 20 U.S.C. § 2734(m); 45 C.F.R. §§ 116.42, 116a.23(f). In order to be eligible for Title I funds, a program must satisfy certain statutory criteria that are designed to assure that the Act's purposes are advanced. For example, Title I funds may

be provided only to children who meet the dual eligibility requirement of (1) educational deprivation, defined as below age-level performance and (2) residence in an area designated by the LEA, in accordance with Title I regulations, as having a high concentration of children from low-income families. *Id.* §§ 2722, 2732-2734. Federal financing is available only for programs that will supplement, rather than supplant, non-federally funded programs that would have been available in the absence of Title I funds. *Id.* §§ 2734 (f), 2736(c).

Participation in Title I programs is not limited to children enrolled in public schools. The Act provides:

To the extent consistent with the number of educationally deprived children in the school district of the local educational agency who are enrolled in private elementary and secondary schools, such agency shall make provision for including special educational services and arrangements (such as dual enrollment, educational radio and television, and mobile educational services and equipment) in which such children can participate.... Expenditures for educational services and arrangements pursuant to this section for educationally deprived children in private schools shall be *equal* (taking into account the number of children to be served and the special educational needs of such children) to expenditures for children enrolled in the public schools of the local educational agency.

20 U.S.C. § 2740(a) (emphasis added). Title I regulations require that each LEA provide services designed to meet the needs of educationally deprived children who attend private schools. 45 C.F.R. § 116a.23. These children must be given "genuine opportunities to participate," and the types of services to be provided shall be determined "on a basis comparable to that used in providing for the participation of public school children." *Id.*

As noted by the Supreme Court, Congress anticipated that "one of the options open to the local agency in designing a suitable program for private school children was the provision of on-the-premises instruction." *Wheeler v. Barrera, supra*, 417 U.S. at 422; see S. Rep. No. 146, 89th Cong., 1st Sess., reprinted in [1965] U.S. Code Cong. & Ad. News 1446, 1457; 111 Cong. Rec. 5747-48 (1965) (remarks of Congressman Goodell, Carey and Perkins). Federal and local officials administering the statute have adhered to the view that services directed to nonpublic school children may be provided on the premises of the nonpublic institution. *Wheeler v. Barrera, supra*, 417 U.S. at 421-23; 45 C.F.R. § 116a.23(f); Affidavit of Genevieve Dane, Program Operations Branch Chief in HEW's Division of Education for Disadvantaged, sworn to April 20, 1979 ("Dane Aff."), ¶ 11; Affidavit of Lawrence F. Larkin, Director of the Bureau of Nonpublic School Reimbursable Services for the New York City Board of Education, sworn to April 17, 1979 ("Larkin Aff."), ¶ 9.

Title I regulations impose restrictions on the services provided on the premises of the nonpublic schools to assure that the programs remain secular both in content and setting. Public school personnel may provide instruction on nonpublic school premises only to the extent necessary to make such special services available to those educationally deprived children for whom the Title I program was designed. 45 C.F.R. § 116a.23(f). These services may be provided to eligible students only if they are not otherwise provided by the nonpublic school. *Id.* Title I funds may not be used to pay the salaries of private school teachers or employees, except for services performed outside their regular hours of duty under public supervision and control. *Id.* The LEA must maintain exclusive direction and control over all Title I services and funds, wherever provided; no public funds can be disbursed to the schools. *Id.*

§ 116.42. If any equipment or materials are used in a private school's Title I program, the LEA must maintain title to and physical control of the property and must remove it from the premises if necessary to prevent its being used for any purpose other than the Title I program. *Id.*

If a state or locality fails to comply with Title I requirements pertaining to the approval of local projects, disbursements of funds, or program supervision, the federal government must terminate or suspend Title I funding. 20 U.S.C. § 2836(a); 45 C.F.R. § 116.20. The statute provides, however, that in the event an LEA "is prohibited by law from providing for the participation in special programs for educationally deprived children enrolled in private elementary and secondary schools as required [by the Act], the Commissioner [of Education] shall waive the requirement, and shall arrange for the provision of services to such children through arrangements which shall be subject to the requirements of [the Act]." 20 U.S.C. § 2740(b)(1). This provision reflects Congress's intent "that state constitutional spending proscriptions not be pre-empted as a condition of accepting federal funds." *Wheeler v. Barrera, supra*, 417 U.S. at 417. If the LEA is prohibited by state or local law from providing for the "equitable" participation of private school students in Title I programs, the Commissioner waives the statutory requirement that the state assure such participation and "bypasses" local authorities by arranging for the direct provision of services to eligible private school children. 20 U.S.C. § 2740(b)(2). In Missouri, for example, state law prohibits the provision of Title I services on the premises of nonpublic schools during regular school hours. The United States Office of Education conducted a study in 1976 to determine the manner in which Title I services were being provided to nonpublic school children in four Missouri cities. The study concluded that

the services provided at times other than during the normal school day were not comparable in quality, scope, and opportunity for participation to services provided during regular school hours. Affidavit of Joseph J. Vopelak, Acting Chief of the Institutional Services Section, Program Support Branch, in HEW's Division of Education for the Disadvantaged, sworn to April 20, 1979 ("Vopelak Aff."), ¶ 14. On the basis of this study, the Commissioner of Education directed that Title I services be provided directly to nonpublic school children in those four districts. *Id.* ¶ 16. Initial determinations of noncomparability have been made with respect to more than fifty other Missouri districts. *Id.*⁶

Title I is the largest single federally funded education program in the United States. During the 1979-1980 school year, services will be provided to approximately 4,800,000 public school children and 200,000 private school children across the nation. Dane Aff. ¶ 3. About 4 percent of the projected budget, or \$105,200,000, will be spent on services for private school children. *Id.*

⁶ In 1970, parents of children enrolled in nonpublic schools filed a class action alleging that the state had arbitrarily and illegally deprived their children of services to which they were entitled under Title I. While remedial instruction was available in public schools during regular hours, such services were not provided at the parochial schools during the school day. This action resulted in the Supreme Court's decision in *Wheeler v. Barrera, supra*. The Court held that "the State is not obligated by Title I to provide on-the-premises instruction" because "comparable," not "identical" programs are mandated by the statute. 402 U.S. at 419. In remanding the case, the Court declined to rule on the Establishment Clause issue present in the case because no specific plan involving the placement of public school teachers in parochial schools was before the Court. The Court recognized, however, that this option was available to the state in implementing the Court's order on remand. *Id.* at 401.

**New York City's
Title I program**

The New York City Board of Education ("Board") is responsible for administering the largest program of Title I remedial educational services in the United States. During the 1978-1979 school year, a total of 404,686 public and non-public school students were eligible for Title I services. Larkin Aff. ¶ 34. Of that total, 33,285, or 8.2 percent, were enrolled in nonpublic schools. *Id.* ¶ 35. Because of budgetary and logistical limitations, however, only 13,265 of the eligible nonpublic school students were expected to receive Title I services during that year. *Id.*

In New York City, Title I remedial services are provided directly on the premises of the nonpublic schools during regular school hours. The Board adopted this arrangement only after experimenting with alternative programs. During the first academic year that Title I funds were available, the Board attempted to provide services to private school students after regular school hours on the premises of both the private and public schools. The results of this experiment, however, were quite discouraging. *Id.* ¶ 135. Attendance was poor, students were inattentive, teachers were tired, and parents were concerned about the safety of children leaving school late in the afternoon. *Id.* ¶ 136. A suggested alternative to providing services at the nonpublic schools during the school day was to offer instruction to nonpublic school students at public schools during regular school hours. However, serious questions were raised about the constitutionality, under Article XI of the New York State Constitution, of allowing parochial school students to participate with public school students in programs conducted during regular school hours at the public school. *Id.* ¶ 138(a); Defendants' Exh. L at 3 (Statement by Board on Title I Proposals, August 31, 1966). Upon considering these le-

gal problems and the difficulties created by an after-hours program, the Board decided to establish Title I programs on the premises of nonpublic schools during regular school hours. Larkin Aff. ¶ 138; Defendants' Exh. L at 3. In adopting this arrangement, the Board was cognizant of the need to maintain the secular integrity of the program. The Board thus stated that it

will provide the following services for educationally disadvantaged children in non-public schools, on their premises, during the school day: remedial reading, remedial arithmetic, speech therapy, and guidance counselling. The instruction will be given by peripatetic teachers, who will go from one school to another during particular periods; no teacher will be so assigned without his consent. The instruction will not duplicate any of the regular class-room work of the schools involved. Speech improvement instruction, for example, as distinguished from speech therapy (for stammering and other speech impediments), has been eliminated from the proposals as being too close to regular class-room work. Library services for non-public schools have likewise been eliminated as being outside the limited areas of remedial and therapeutic, and as constituting services to institutions more directly than to children.

Defendants' Exh. L at 3.

During the 1977-1978 school year, the Bureau of Nonpublic School Reimbursable Services analyzed the costs that would be incurred if the Title I program for nonpublic school students were to be conducted at sites other than the nonpublic schools. That analysis revealed that annual transportation costs plus other non-instructional expenses would amount to more than \$4.2 million which, for the 1977-1978 academic year, was more than 42 percent of the total budget for the private school Title I program. Larkin Aff. ¶¶ 148, 152; Defendants' Exh. N (Analysis of Differences in Costs and

Services For On-Premises and Off-Premises Services To Nonpublic School Pupils During the Regular School Day). The reduction in staff that would be required to meet those additional costs would result in the elimination of services to 5,039 students, 36 percent of those who received Title I services during the 1977-1978 year. Larkin Af. ¶ 153.

The vast majority of nonpublic school students in New York City who are eligible for and actually receive Title I remedial services attend schools that are affiliated with one of several religious denominations. Board statistics show that approximately 87 percent of these students are enrolled in schools affiliated with the Roman Catholic Archdiocese of New York and Diocese of Brooklyn. *Id.* ¶ 156. An additional 9 percent of the Title I students attend Hebrew Day Schools. *Id.*

Five types of remedial services are provided to nonpublic school children who satisfy Title I eligibility criteria: remedial reading, reading skills instruction, remedial mathematics, English as a second language, and clinical and guidance services. *Id.* ¶ 39. These services are provided by teachers and support staff who are employed by the Board and subject solely to its supervision and control. *Id.* ¶ 52. Title I teachers generally provide instruction to small groups of students and work with no more than 100 students in a week. *Id.* ¶ 49. The clinical and guidance professionals provide diagnostic testing, consultation and counseling services on an individual basis to children who are having difficulty benefiting from the Title I remedial program. *Id.* ¶¶ 47, 48.

Assignment to a nonpublic school Title I program is purely voluntary, and any teacher may refuse appointment to the program without losing seniority. *Id.* ¶ 54. Parochial school officials have no voice in the initial assignment of a Title I teacher or professional, and there is no known instance of any official or teacher re-

questing reassignment on religious grounds. *Id.* ¶¶ 56, 57. No inquiry is made into a staff person's religious affiliation or beliefs; therefore this has no bearing on appointment to a nonpublic school. *Id.* ¶ 55. Although the Board maintains no record of religious affiliations, the affidavits of Title I teachers submitted in this action demonstrate that most of them work in parochial schools with religious affiliations different from their own. *Id.* ¶¶ 55, 72. The vast majority of teachers are itinerant and spend less than five days a week at the same nonpublic school. *Id.* ¶ 60.

Each teacher and support professional assigned to a nonpublic school is given a detailed set of written instructions, as well as a series of oral instructions, that delineate his responsibilities and the restrictions imposed on his activities. *Id.* ¶¶ 62, 63. These guidelines emphasize that Title I personnel are independent public school employees who "do not service the entire school" and who have ultimate control over the selection of students for participation in the program. *Id.* ¶¶ 64, 65; Defendants' Exh. F at 130 (Board of Education Orientation Procedures for Nonpublic School Title I Programs). Teachers are instructed that they are not to engage in team teaching or cooperative instructional activities, although they may discuss a student's needs and progress with their counterparts on the parochial school faculty. Larkin Aff. ¶ 68. Title I personnel are also directed not to introduce any religious topics into the curriculum or become involved in the religious aspects of the school. *Id.* ¶ 69. Periodic evaluations and direct program supervision assure that Title I staff members comply with the Board's guidelines and restrictions. *Id.* ¶¶ 73-85.

Title I teachers in nonpublic schools occupy classrooms that are specifically designated solely for that purpose and that are free from any religious symbols, pictures, or statutes. *Id.* ¶¶ 103, 105. None of the ma-

terials used in any Title I program has any religious content. *Id.* ¶ 91. The Board retains title to and administrative control over all Title I property, and a comprehensive record keeping and inventory system guards against any diversion or misuse of equipment and materials. *Id.* ¶ 92. Title I teachers are instructed that when materials and supplies are not being used they should be secured, preferably in locked cabinets provided for that purpose. *Id.* ¶ 95. In compliance with the statute and its regulations, no Title I funds are paid to non-public schools to finance the salaries of regular classroom teachers, to construct facilities, or to reimburse the schools for any costs they incur in providing space for Title I programs. *Id.* ¶ 99.

The Establishment Clause

Declining to rule on the constitutionality of a "hypothetical" Title I program conducted on the premises of a parochial school, the Supreme Court declared that "the First Amendment implications may vary according to the precise contours of the plan that is formulated." *Wheeler v. Barrera, supra*, 417 U.S. at 426. The Court stated, for example, that "a program whereby a former parochial school teacher is paid with Title I funds to teach full time in a parochial school undoubtedly would present quite different problems than if a public school teacher, solely under public control, is sent into a parochial school to teach special remedial courses a few hours a week." *Id.* The latter fact pattern described in *Wheeler* is now before this Court.

Resolution of this issue requires application of the tripartite Establishment Clause test established by the Supreme Court.

First, the statute must have a secular legislative purpose. *E.g., Epperson v. Arkansas*, 393 U.S. 97. Second, it must have a "primary effect" that neither advances nor inhibits religion. *E.g., School District of Abington Township v. Schempp*, 374

U.S. 203. Third, the statute and its administration must avoid excessive government entanglement with religion. *E.g., Walz v. Tax Comm'n*, 397 U.S. 664.

Meek v. Pittenger, supra, 421 U.S. at 358. Although easily and frequently recited, the test is not a precise formula, for "the line of separation, far from being a 'wall,' is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship." *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1970). The Court should not engage in a "legalistic minuet in which precise rules and forms must govern," for "[a] true minuet is a matter of pure form and style, the observance of which is itself the substantive end." *Id.* As directed by the Supreme Court, "[h]ere we examine the form of the relationship for the light that it casts on the substance." *Id.*

1. Secular Legislative Purpose

In considering legislative purpose, the Court must look to the statement of intent contained in the legislation itself, or to the legislative history. It must also look to the legitimate government interest in providing assistance to nonpublic schools and their students. In this regard, it is noteworthy that the Supreme Court has never invalidated an educational aid statute on the express ground that its purpose was the advancement of religion. *See, e.g., Wolman v. Walter*, 433 U.S. 229, 236 (1977); *Meek v. Pittenger, supra*, 421 U.S. at 363, 368; *Committee for Public Education v. Nyquist*, 413 U.S. 756, 773 (1973); *Tilton v. Richardson*, 403 U.S. 672, 679 (1971); *Lemon v. Kurtzman, supra*, 403 U.S. at 613.

The legislative history of Title I clearly demonstrates that the purpose of the statute was to give aid to needy children regardless of where they attend school. *See* 20 U.S.C. § 2071; S. Rep. No. 146, 89th Congress, 1st Sess., *reprinted in* [1965] U.S. Code Cong. & Ad.

News 1446, 1450. The government has a legitimate interest in providing remedial aid to private school students. Plaintiffs do not suggest that the enactment of Title I was motivated by an impermissible congressional purpose or design. Title I clearly serves a secular legislative purpose, and the statute satisfies the first prong of the three-part test.

2. Primary Effect

"Aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting." *Hunt v. McNair*, 413 U.S. 734, 743 (1973). The Establishment Clause precedents that guide this Court reflect a clear distinction between programs that provide aid directly to nonpublic parochial school students and those that either in form or substance provide direct assistance to the parochial schools themselves. This line was first drawn in *Everson v. Board of Education*, 330 U.S. 1 (1947), in which the Court upheld the use of public funds to pay the bus fares of parochial school students. This arrangement was part of a general program under which the state paid the bus fares of all students attending public and nonpublic schools. According to the Court, the state contributed no money to the private schools, but merely helped children get to and from whatever school they attended. *Id.* at 17-18. Similar reasoning was employed in *Board of Education v. Allen*, 392 U.S. 236 (1968), in upholding the constitutionality of a state statute authorizing textbook loans to children in public and private schools. The Court stated that "no funds or books are furnished to parochial schools and the financial benefit is to parents and children, not to schools." *Id.* at 244. Comparable textbook loan programs were subsequently approved by the

Court in *Wolman v. Walter*, *supra*, 433 U.S. at 238, and *Meek v. Pittenger*, *supra*, 421 U.S. at 362. The Court has also affirmed a district court decision that upheld a state statute authorizing financial assistance to a broad class of needy students in public and nonpublic colleagues. *American United for Separation of Church and State v. Blanton*, 433 F. Supp. 97 (M.D. Tenn.), summarily aff'd, 434 U.S. 803 (1977). Although the district court discussed Supreme Court decisions drawing constitutional distinctions between higher and lower levels of sectarian education,⁷ the court relied primarily on the "child benefit" principles of *Everson* and *Allen*. Ultimately, the aid program was upheld because "the emphasis . . . [was] on the student rather than the institution, and . . . no one religion [was] favored by the program, nor [were] private or religious institutions favored over public-institutions." *Id.* at 104.

Statutes providing aid directly to parochial institutions were struck down in *Committee for Public Education v. Nyquist*, *supra*, and *Levitt v. Committee for Public Education*, 413 U.S. 472 (1973). *Nyquist* involved, in part, a "maintenance and repair" provision authorizing grants to nonpublic schools without effective restrictions on the ways in which the funds could be used. The Court ruled that the inevitable effect of the grants was to "subsidize and advance the religious

⁷ Compare *Hunt v. McNair*, *supra*, and *Tilton v. Richardson*, *supra*, with *Levitt v. Committee for Public Education*, *supra*, and *Lemon v. Kurtzman*, *supra*. The Court has consistently found the religiously affiliated institutions in the college aid cases not to be pervasively sectarian, while so characterizing parochial elementary and secondary schools. See discussion *infra*. The Court has indicated, however, that aid to a pervasively sectarian college may be constitutionally suspect. *Tilton v. Richardson*, *supra*, 403 U.S. at 682. Since *Blanton* involved colleges of this kind, 433 F. Supp. at 100, the court apparently relied on the fact that the aid flowed to the students and not to the institutions.

mission of sectarian schools." 413 U.S. at 780. The statute invalidated in *Levitt* authorized direct payments to private schools for expenses incurred in connection with testing, maintenance of enrollment records, maintenance of pupil health records, and recording of personnel qualifications and characteristics. Holding that the statute had the primary effect of advancing religion, the Court started that that aid provided for secular functions was not "identifiable and separable" from assistance to sectarian activities. 413 U.S. at 480.

The mere identity of the party receiving government aid is not necessarily dispositive in determining whether a statute primarily advances religion. In *Nyquist and Sloan v. Lemon*, 413 U.S. 825 (1973), the court invalidated state statutes that provided tuition reimbursements and tax relief to parents of parochial school children. The Court looked beyond the formal recipient of the aid and found that its effect was to provide financial support for sectarian institutions. *Id.* at 832. And just as aid purportedly directed to students or parents may be impermissible, assistance provided directed to the institution may survive judicial scrutiny. For example, in *Tilton v. Richardson*, 403 U.S. 672 (1971), the Supreme Court rejected a primary effect challenge to a federal statute that authorized direct grants to institutions of higher education for academic facilities. The Act permitted grants to sectarian schools, but only for facilities that would be used for a defined secular propose, and expressly prohibited the use of the facilities for any religious activities.⁸ Similarly, in *Hunt v. McNair, supra*, the Court upheld a state statute that provided financial assistance to insti-

⁸ The Court invalidated, however, a statutory provision that imposed a twenty-year limitation on the federal government's right to recapture a portion of the facility's present value if any of the statutory restrictions were violated. 403 U.S. at 683-84.

tutions of higher education engaged in the construction of buildings and facilities. The Court relied, in part, on statutory restrictions prohibiting use of the facilities for religious activities and noted that the Baptist College involved in the case was not a "pervasively sectarian" institution. 413 U.S. at 743-44. The Court has recently upheld a state statute authorizing public funds to reimburse church-sponsored and secular nonpublic schools for expenses incurred in complying with certain state-mandated requirements pertaining to testing, reporting, and record keeping. *Committee for Public Education v. Regan*, 48 U.S.L.W. 4168 (U.S., February 20, 1980). In contrast to the statute previously invalidated in *Levitt v. Committee for Public Education, supra*, this provision covered only state-prepared tests—not those prepared by the private school teachers and established an auditing system to monitor the use of state funds. Relying on these distinctions, the Court upheld the statute on the grounds that the nonpublic schools had no control over the tests; the nonpublic school teachers who graded the objective, multiple-choice exams had no control over the results; and the law provided ample safeguards against excessive or misdirected reimbursement. Cases such as *Regan*, *Hunt* and *Tilton* reveal that under certain circumstances, the government may furnish funds or services directly to a sectarian institution if their use is effectively restricted to nonreligious functions and activities.

Title I clearly adheres to the child benefit principle established in *Everson* and *Allen*. The student aid program established by the statute is religiously neutral and is potentially available to all needy children regardless of where they attend school. As required by the statute, Title I services are provided "on an equitable basis" to public and private school children. 20 U.S.C. § 2740(b)(2). During 1978, for example, nationwide expenditures for nonpublic school students accounted for

only four percent of the total fiscal year appropriation for Title I. Dane Aff. ¶ 3. In New York, about eight percent of Title I funds was budgeted for private school children. Larkin Aff. ¶ 35. Fewer than one-fourth of the nonpublic schools in the City have Title I programs conducted on their premises. *Id.* Services are provided to eligible nonpublic school students on the premises of their schools during regular school hours because that is the location "where the needs of the children can best be served," 45 C.F.R. § 116a.19(c), and where these students can receive services that are "comparable" to those provided in public schools, *id.* § 116a.23(c).

Unlike the direct institutional aid statutes invalidated in *Nyquist* and *Levitt*, Title I funds and services do not flow to the parochial schools. Nor are the students merely the formal recipients of the aid. The program is therefore not comparable to a tuition reimbursement or tax break offered only to parents of private school students because it does not relieve the schools' financial burdens or supply funds free from use limitations and is not limited to a small class of beneficiaries. Cf. *Sloan v. Lemon*, *supra*, 413 U.S. at 832 (invalidating state-sponsored tuition reimbursement for parents of children in nonpublic schools, regardless of income level, as financial support for religious institution); *Committee for Public Education v. Nyquist*, *supra*, 413 U.S. at 783, 791 (invalidating tuition reimbursement and tax relief for parents of students in nonpublic schools as constituting "a charge made upon the state for the purpose of religious education"). In the words of the Supreme Court, "the legislative aim of Title I was to provide needed assistance to educationally deprived children rather than to specific schools." *Wheeler v. Barrera*, *supra*, 417 U.S. at 406 (emphasis in original). In short, neither the statute nor the programs it has engendered constitute a vehicle for advancing religious education.

The parochial schools whose students receive Title I services may reap some incidental benefits from the program. The Supreme Court, however, "has not accepted the recurrent argument that all aid is forbidden because aid to one aspect of an institution frees it to spend its resources on religious ends." *Hunt v. McNair, supra*, 413 U.S. at 713. In fact, Title I funds cannot be used for services that would supplant programs that would otherwise have been available in the absence of federal funds. 20 U.S.C. § 2736(c); 45 C.F.R. § 116.40. Statutory regulations also insure that Title I materials and equipment will not be used to benefit the parochial schools where services are provided. 45 C.F.R. § 116.24(a); Larkin Aff. ¶¶ 92-98. The incidental benefits that may inure to a parochial school where Title I services are provided are insufficient to render the statute unconstitutional. See *Hunt v. McNair, supra*, 413 U.S. at 742.

Title I's adherence to the child benefit principle does not, however, make the statute automatically immune from a primary effects challenge. Neither *Everson* nor *Allen* provides a "per se immunity" from judicial examination of the "substance" of a government aid program. *Committee for Public Education v. Nyquist, supra*, 413 U.S. at 781. In subsequent decisions the Court has carefully pointed out the special characteristics of the government assistance provided in those cases.

In *Everson*, the Court found the bus fare program analogous to the provision of services such as police and fire protection, sewage disposal, highways, and sidewalks for parochial schools. Such services, provided in common to all citizens, are "so separate and so indisputably marked off from the religious function," that they may fairly be viewed as reflections of a neutral posture toward religious institutions. *Allen* is founded upon a similar principle. The Court there repeatedly empha-

sized that upon the record in that case there was no indication that textbooks would be provided for anything other than purely secular courses.

Id. at 781-82 (citations omitted), quoted in *Wolman v. Walter, supra*, 433 U.S. at 251 n.18.

The *Wolman* Court upheld the use of public school employees to provide on-premises diagnostic services and off-premises therapeutic services to nonpublic school students. According to the Court, diagnostic services, unlike teaching or counseling, have little or no educational content, are not associated with the school's educational mission, and would not be subject to religious pressure or influence. *Id.* at 244. Because the diagnostician has only limited contact with the student, there is less opportunity for the transmission of religious views. *Id.* The Court acknowledged that the therapist who provides guidance and remedial services may establish a more substantial and long-term relationship with the student through which religious views could be conveyed. *Id.* at 247. Yet the Court concluded that the danger of religious advancement does not arise if the services are provided at religiously neutral locations, for it is "the pervasively sectarian atmosphere of the church-related school" that created environmental pressures capable of "alter[ing] the [public school employee's] behavior from its normal course." *Id.* In the view of the *Wolman* Court, the ideological pressures generated by the pervasive sectarian atmosphere of a religious institution are qualitatively greater, and therefore constitutionally different, than the minimal influence on a teacher's behavior that may result from merely teaching a student enrolled in a parochial school. Furthermore, the nature of the student-teacher interaction and the location where it occurs were apparently more important to the Court than whether the student or the school was the direct recipient of the aid;

simple conformity to the child benefit standard does not assure constitutionality.

The Supreme Court has repeatedly declared that “[w]hether the subject is ‘remedial reading,’ ‘advanced reading,’ or simply ‘reading,’ a teacher remains a teacher, and the danger that religious doctrine will become intertwined with secular instruction persists.” *Meek v. Pittenger*, *supra*, 421 U.S. at 370, quoted in *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 501 (1979).⁹ In contrast to *Everson*, *Allen*, and *Regan*, the case at bar involves government aid in the form of ongoing educational instruction that cannot be screened in advance for ideological content. “In terms of potential for involving some aspect of faith or morals in secular subjects, a textbook’s content is ascertainable but a teacher’s handling of a subject is not.” *Lemon v. Kurtzman*, *supra*, 403 U.S. at 617 (invalidating, in part, state-subsidized salary supplement for nonpublic school teachers who teach only secular courses). And unlike the government-sponsored diagnostic services upheld in *Wolman*, Title I provides continuous remedial instruction that entails more than minimal teacher-student contact.

Title I services are comparable to the off-premises therapeutic and remedial services approved by the *Wolman* Court. Yet in that case, the Court relied on the grounds that the use of a religiously neutral site negated the danger of religious advancement.

⁹ The Supreme Court’s decision in *Meek*, which in part invalidated the provision of “auxiliary services” on the premises of nonpublic schools, is critical to the resolution of the issue in this case. That case is discussed more extensively in section 3, the “excessive entanglement” portion of this Opinion, because the Court ruled on entanglement grounds. 421 U.S. at 369, 372. Of course the *Meek* Court was also concerned about the program’s potential for impermissibly advancing religion, *id.* at 370-72, and another section of the statute challenged in *Meek* was invalidated on that ground, *id.* at 363, 366.

The question before this Court is whether the apparent differences between Title I and the programs upheld in *Everson*, *Allen*, *Regan*, and *Wolman* render this statute as applied unconstitutional. The Court concludes that they do not. The determination that Title I as applied does not have a primary effect that advances religion is based, in part, on: the characteristics of the parochial schools where services are provided; the regulations restricting the activities of Title I teachers and the use of Title I materials; and, most importantly, the substantial evidentiary record compiled in this case that demonstrates to the Court's satisfaction that the program has remained free from religious influences and has not promoted the religious mission of the nonpublic schools.

In describing the "primary effect" prohibited by the establishment Clause, the Supreme Court has referred to aid flowing to "an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission." *Hunt v. McNair*, *supra*, 413 U.S. at 743. The profile of a "pervasively sectarian school" has been described in several Supreme Court cases. See, e.g., *Meek v. Pittenger*, *supra*, 421 U.S. at 356; *Committee for Public Education v. Nyquist*, *supra*, 413 U.S. at 767-68; *Levitt v. Committee for Public Education*, *supra*, 413 U.S. at 476. Typically, such schools:

- (1) are controlled by churches or religious organizations,
- (2) have as their purpose the teaching, propagation and promotion of a particular religious faith,
- (3) conduct their operations, curriculums and programs to fulfill that purpose,
- (4) impose religious restrictions on admissions,
- (5) require attendance at instruction in theology and religious doctrine,
- (6) require attendance at or participation in religious worship,
- (7) are an integral part of the religious mission of the sponsoring church,
- (8) have as a substantial or dominant purpose the inculca-

tion of religious values, (9) impose religious restrictions on faculty appointments, and (10) impose religious restrictions on what the faculty may teach.

Meek v. Pittenger, supra, 421 U.S. at 356. According to the Court, "the potential for impermissible fostering of religion" arises when public employees perform "important educational services in schools in which education is an integral part of the dominant sectarian mission and in which an atmosphere dedicated to the advancement of religious belief is constantly maintained." *Id.* at 371-72.

This description of a hypothetical, pervasively sectarian institution was relied upon by plaintiffs' counsel in questioning Dr. Ellis, the Executive Deputy Commissioner for Educational Programs, at the trial in this case. Counsel sought to establish that the federal government interpreted and applied Title I to authorize government assistance to students who attended non-public schools that fit the pervasively sectarian profile. Tr. 42-60. As discussed above, this line of questioning missed the mark, for the court cannot rule on the basis of even well-founded hypotheticals in the absence of evidence concerning a concrete program. In *Tilton v. Richardson*, 403 U.S. 672 (1971), the court upheld direct federal grants to four colleges with religious affiliations. Holding that none was pervasively sectarian, a plurality of the Court stated that "[i]ndividual projects can be properly evaluated if and when challenges arise with respect to particular recipients and some evidence is then presented to show that the institution does in fact possess these characteristics." *Id.* at 682. This Court, therefore, must evaluate Title I with respect to the New York City program on the basis of the evidence presented in this case.

The record before the Court includes uncontested evidence from administrators of Catholic and Hebrew Day schools where Title I services are provided that

demonstrates that these institutions do not have the characteristics of the pervasively sectarian schools described by the Supreme Court. The evidence shows that these nonpublic schools (1) do not restrict the admission of students on religious grounds, Affidavit of Reverend Monsignor John J. Healy, sworn to March 22, 1979 ("Healy Aff."), ¶¶27-30; Affidavit of Reverend Vincent D. Breen, sworn to March 22, 1979 ("Breen Aff."), ¶¶ 20-25; Affidavit of Rose Fogel, sworn to April 16, 1979 ("Fogel Aff."), ¶ 7; Affidavit of Rabbi David Rogoff, sworn to April 15, 1979 ("Rogoff Aff."), ¶ 7; (2) do not restrict the hiring of teachers on religious grounds, Healy Aff. ¶¶ 32-35; Fogel Aff. ¶ 10; Rogoff Aff. ¶ 9; (3) do not attempt to compel their students to accept or obey the doctrines of the sponsoring church or religious organization, Healy aff. ¶¶ 21-26; Breen Aff. ¶¶ 35-37; Fogel Aff. ¶ 7; Rogoff Aff. ¶ 7; (4) offer separate programs of secular and religious instruction and do not impose religious restrictions on the content of the instruction offered, Healy Aff. ¶¶ 36-47; Breen Aff. ¶¶ 26-29; Fogel Aff. ¶¶ 8, 9; Rogoff Aff. ¶ 8. Furthermore, the numerous affidavits of Title I teachers and professionals show that these public employees do not perceive a "dominant sectarian mission" and have not been subject to religious pressures or influences in the parochial schools in which they work. See, e.g., Affidavit of Gail Meisel, sworn to April 12, 1979, ¶ 23; Affidavit of Susan Seidler, sworn to April 5, 1979, ¶ 19; Affidavit of Carol Almour, sworn to April 5, 1979, ¶ 18; Affidavit of Anna Marie Carrillo, sworn to March 27, 1979, ¶ 19; Affidavit of Fran Levy, sworn to March 27, 1979, ¶ 19. New York City's use of public school teachers on private school premises does not, therefore, create the same degree of potential for religious advancement that the *Meek* Court feared would result from placing public employees in pervasively sectarian institutions. See *Hunt v. McNair*, *supra*, 413 U.S. 26

743-44 (rejecting primary effect challenge to state aid to college that could not be deemed pervasively sectarian; although trustees were elected by state Baptist Convention, whose approval was required for certain financial transactions and all charter amendments, no religious restrictions were imposed on faculty membership or student admissions).

The distinctions between the New York City schools where Title I services are provided and the pervasively sectarian schools described in *Meek* and other cases does not, however, ensure that the Title I program will not promote religion. The Supreme Court's opinion in *Wolman v. Walter, supra*, demonstrates that even government aid to a religiously affiliated, but not pervasively sectarian, private school can have this unconstitutional effect. The schools involved in *Wolman* did not restrict the admission of students or the hiring of teachers on religious grounds, did not require pupils who were not members of the sponsoring church to attend religion classes, and did not require teachers to teach religious doctrine as part of the secular courses taught in the school. 433 U.S. at 234-35. Yet the *Wolman* Court indicated that these characteristics were not sufficient to distinguish that case from prior decisions. *Id.* at 235 & n.4, 249-51. Furthermore, the Court upheld the provision of remedial and therapeutic services because "[s]o long as these types of services are offered at *truly religiously neutral locations*, the danger perceived in *Meek* does not arise." *Id.* at 247 (emphasis added). Finally, a provision authorizing the loan to students or their parents of instructional materials and equipment "incapable of diversion to religious use" was invalidated in *Wolman* because, "[i]n view of the impossibility of separating the secular education function from the sectarian, the state aid inevitably flows in part in support of the religious role of the schools." *Id.* at 248-50.

Divorcing the secular function from the sectarian is not impossible with respect to the educational services provided by Title I. The equipment and materials stored at nonpublic schools are used exclusively for Title I instruction and are secured in Title I classrooms when not being used by public school employees. Title I teachers are well aware of the regulations restricting their own activities and the use of Title I materials. The *Wolman* Court rejected the argument that the loan provision should be upheld because materials were loaned to parents and students and not to the private schools. According to the Court, it would "exalt form over substance" to treat this arrangement any differently than a previously invalidated provision authorizing direct loans of materials to the nonpublic schools. *Id.* at 250. In contrast to either of these arrangements, Title I is a true student aid program, not merely a vehicle for channeling assistance to private institutions. Although the Supreme Court has refused to extend to other items the presumption of neutrality applied to textbooks, *id.* at 252 n.18, the evidence presented here demonstrates that Title I materials and equipment are not diverted from their intended use and do not promote any religious activity. In short, the publicly owned instructional materials do not support the collective educational enterprise of the parochial school.

In *Wolman*, the "religiously neutral locations" where private school students received remedial services were "neither physically nor educationally identified with the functions of the nonpublic school." *Id.* at 246-47, quoting *Wolman v. Essex*, 417 F. Supp. 1113, 1123 (S.D. Ohio 1976), *aff'd in part, rev'd in part sub nom. Wolman v. Walter, supra*. In New York City, Title I services are provided on the premises of parochial schools, typically in classrooms set aside for that purpose. Although physically unified, secular and sectarian instruction remain educationally distinct. Title I class-

rooms are free from religious symbols, contain separate materials and equipment, and are run solely by public school employees who are not subject to the supervision of private school administrators. Title I teachers and supervisors develop their own curricula, and no lessons have any religious or ideological content.

In certain respects, this arrangement resembles a situation depicted by Justice Brennan in an opinion concurring with the Court's denial of certiorari in the case of *Nebraska State Board of Education v. School District of Hartington*, 188 Neb. 1, 195 N.W.2d 161 (1972), *cert. denied*, 409 U.S. 921 (1972). In *Hartington*, the Nebraska Supreme Court upheld a Title I grant proposal that involved the use of public funds to lease two unused classrooms in a Catholic High school that would be used for remedial education courses for public and private school students. Under the lease, the school district had full and exclusive control over the classrooms and the remedial instruction; no religious objects or pictures remained in the rooms. Justice Brennan, who is generally not sympathetic to government programs assisting religious institutions,¹⁰ found the plan perfectly acceptable.

There is not the slightest suggestion that this was a subterfuge to make a subsidy to the parochial school, or anything except an arrangement motivated solely by the lack of space in the public schools. Thus, the school district would have no

¹⁰ For example, Justice Brennan dissented from the Supreme Court's recent opinion upholding the use of public funds to reimburse church-sponsored private schools for expenses incurred in performing various services mandated by the state. *Committee for Public Education v. Regan*, *supra*, 48 U.S.L.W. at 4173 (Blackmun, J., dissenting in an opinion joined by Justices Brennan and Marshall). He also dissented from that portion of the Court's opinion in *Meek v. Pittenger*, *supra*, that upheld the loan of textbooks to nonpublic school children. 421 U.S. at 373 (Brennan, J., dissenting).

part whatever in the curriculum of the parochial school either by way of subsidy of its costs through financing of teaching or otherwise. The remedial reading and remedial mathematics courses would operate completely independently of that curriculum and of the Catholic school administration. . . . I have heretofore expressed my view that the First Amendment does not render unconstitutional "every vestige, however slight, of cooperation or accommodation between religion and government." *Abington School District v. Schempp*, 374 U.S. 203, 294 (1963) (concurring opinion). The accommodation involved in this case would not trespass beyond permissible bounds.

409 U.S. at 925-26. Justice Brennan's remarks are particularly relevant to the case at bar. The abundant evidence presented in this action demonstrates uniform compliance with the extensive Title I regulations establishing a well defined dichotomy between purely secular instruction and activities subject to religious influences. See generally Larkin Aff. ¶¶ 85, 98, 105.

This evidentiary record is a critical feature distinguishing this case from prior decisions relied upon by the plaintiffs. The Supreme Court has repeatedly warned that the placement of public school teachers in parochial schools, unlike the provision of textbooks or school buses, creates a danger that "religious doctrine will become intertwined with secular instruction," *Meek v. Pittenger*, *supra*, 421 U.S. at 370, quoted in *NLRB v. Catholic Bishop of Chicago*, *supra*, 440 U.S. at 501, because the "pressures of the environment might alter [the teachers'] behavior from its normal course," *Wolman v. Walter*, *supra*, 433 U.S. at 247. Even the "diminished probability of impermissible conduct is not sufficient" to ensure constitutionality. *Meek v. Pittenger*, *supra*, 421 U.S. at 371. Yet in these cases where the Court spoke in terms of potential dangers or probabilities, the program or statute at issue was chal-

lenged shortly after enactment and evidence concerning its operation was scarce. *See, e.g., Wolman v. Walter, supra*, 433 U.S. at 233; *Meek v. Pittenger, supra*, 421 U.S. at 352; *Levitt v. Committee for Public Education, supra*, 413 U.S. at 474.

New York City has been providing Title I services in nonpublic schools for fourteen years. The evidence presented in this action includes: extensive background information on Title I; an in-depth description of New York City's program; a detailed review of Title I rules and regulations and the ways in which they are enforced; and the testimony and affidavits of federal officials, state officers, school administrators, Title I teachers and supervisors, and parents of children receiving Title I services. The evidence establishes that the result feared in other cases has not materialized in the City's Title I program. The presumption—that the "religious mission" will be advanced by providing educational services on parochial school premises—is not supported by the facts of this case.

The Court will not conjure up hypothetical situations in the face of a fourteen year record. *See Wheeler v. Barrera, supra*, 417 U.S. at 401-02. On the basis of all the evidence presented, the Court concludes that the risk of religious advancement has not been realized and New York City's Title I program does not have an unconstitutional primary effect.

3. Excessive Entanglement

The Court now turns to the final prong of the tripartite Establishment Clause test. To satisfy this third element, Title I must avoid "excessive entanglement" between the government and religious institutions. While recognizing that some interaction is inevitable, the Supreme Court has sought to prevent the intrusion of either into the realm of the other. As stated by the Court, "[t]he test is inescapably one of degree." *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970).

The plaintiffs contend that the issue in this case was resolved by the Supreme Court's decision on entanglement grounds in *Meek v. Pittenger*, *supra*, and its summary affirmance of the district court opinion in *Public Funds for Public Schools v. Marburger*, *supra*.¹¹ The defendants, in turn, assert that "[t]he central issue in this case is whether an on-premises Title I program gives rise to the same excessive administrative and political entanglement that doomed the auxiliary services program in *Meek*." Post-Trial Brief of Intervenor-Defendants James and Bessie Bovis at 39. Although this characterization of the case unduly slights the primary effect issue left open in *Meek*, 421 U.S. at 369, the question of excessive entanglement is pervasive and, of course, potentially dispositive.

The *Meek* Court (1) upheld a statutory provision authorizing the loan of textbooks to public and non-public school children; (2) invalidated the loan of instructional materials and equipment directly to the non-public schools; and (3) struck down the use of public school employees to provide auxiliary services to non-public school children on the premises of the nonpublic

¹¹ In *Public Funds for Public Schools v. Marburger*, 358 F. Supp. 29 (D.N.J. 1973), summarily aff'd, 417 U.S. 961 (1974), the district court invalidated two provisions of a state statute that: (1) authorized funds for reimbursing nonpublic school students and their parents for the cost of secular textbooks and supplies; and (2) provided funds to the nonpublic schools to acquire secular supplies, equipment, and auxiliary services. The court found that both provisions had the unconstitutional effect of advancing religion and created the potential for excessive entanglement. *Id.* at 36-42.

In *Meek*, the Court characterized its affirmation of *Marburger* as "a decision on the merits as to the constitutionality of New Jersey's auxiliary-services program [that] is entitled to precedential weight." 421 U.S. at 370 n.20. Because the Supreme Court's opinion in *Meek* is substantially similar to that of the district court in *Marburger*, this Court has focused on the *Meek* decision.

school. Some of the on-premises auxiliary services prohibited in *Meek*, such as remedial instruction and counseling, are comparable to the Title I services challenged here. The Court expressly declined to decide whether the provision of these services had the “unconstitutional primary effect of advancing religion” although it invalidated the loan of instructional material on that ground. 421 U.S. at 363, 369. Instead, the Court held that “[t]he prophylactic contacts required to ensure that teachers play a strictly nonideological role . . . necessarily give rise to a constitutionally intolerable degree of entanglement between church and state.” *Id.* at 370, citing *Lemon v. Kurtzman*, *supra*, 403 U.S. at 619. In the Court’s view, to be certain that auxiliary teachers remain religiously neutral, the state would have to restrict their activities and then “engage in some form of continuing surveillance to ensure that those restrictions were being followed.” *Id.* at 372. In addition to this “administrative entanglement,” the Court found “a serious potential for divisive conflict over the issue of aid to religion—‘entanglement in the broader sense of continuing political strife.’” *Id.*, quoting *Committee for Public Education v. Nyquist*, *supra*, 413 U.S. at 792. According to the Court, the recurrent nature of the appropriation process and the repeated confrontations between proponents and opponents of the auxiliary-services program provided successive opportunities for political fragmentation along religious lines.

This potential for political engangement, together with the administrative entanglement which would be necessary to ensure that auxiliary-services personnel remain strictly neutral and nonideological when functioning in church-related schools, compels the conclusion that [the statute] violates the constitutional prohibition against laws “respecting an establishment of religion.”

*Id.*¹²

¹² The Court’s decision to rely upon a combination of the two forms of entanglement may reflect its belief that the use of publicly employed teachers mitigated the danger of administrative

To determine whether Title I creates excessive entanglement between government and religion, this Court must examine "the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the relationship between the government and the religious authority." *Lemon v. Kurtzman, supra*, 403 U.S. at 615. This inquiry reveals that Title I does not suffer from the same infirmities that doomed the auxiliary services program in *Meek*.

First, the true beneficiaries of Title I are educationally deprived children, not the parochial schools that they attend. See section 2 *supra*. The "character" of these institutions is still relevant, however, because the program provides some incidental benefits to the schools and results in some contact between school officials and Title I personnel. In ruling that the auxiliary services program created excessive entanglement, the *Meek* Court relied in part on its determination that services were provided in schools with a "dominant sectarian mission . . . in which an atmosphere dedicated to the advancement of religion is constantly maintained." *Id.* at 371. Similarly, in striking down state subsidies for parochial school teachers' salaries in *Lemon v. Kurtzman, supra*, the Court emphasized the

entanglement. In fact, the *Meek* Court expressly recognized that the potential for "fostering of religion" is "somewhat reduced" under these circumstances. 421 U.S. at 372. In *Lemon v. Kurtzman, supra*, the first case decided on entanglement grounds, the Court invalidated statutes that authorized salary subsidies for parochial school teachers who were obviously subject to the pervasively sectarian atmosphere of the schools. Since the teachers in *Meek* were public employees, they were presumably less susceptible to such influences. Arguably, the risk of administrative entanglement alone would have been an insufficient ground to invalidate the statute.

pervasively sectarian nature of the schools involved. 410 U.S. at 615-20. According to the Court, such schools create a danger that religious doctrine will permeate secular instruction and constant surveillance would be necessary to insure that teachers do not engage in the impermissible fostering of religion. 421 U.S. at 370, 372; 403 U.S. at 619. As described above, the typical nonpublic school where Title I services are provided in New York does not fit the Supreme Court's profile of a pervasively sectarian institution. Nor do the Title I personnel assigned to nonpublic schools perceive a dominant sectarian mission or atmosphere in the schools in which they teach. See section 2 *supra*.

This Court recognizes that the danger of religious advancement may be present in a parochial school that is not pervasively sectarian. See *Wolman v. Walter*, *supra*, 433 U.S. at 235 & n.4, 249-51, and discussion in section 2 *supra*. Yet the Supreme Court's emphasis on the characteristics of pervasively sectarian institutions indicates that such school enhance the danger that religious views will be fostered. Accordingly, to the extent that this risk is minimized in New York City's nonpublic schools, which are not pervasively sectarian, the need for continuous surveillance to guard against this danger is correspondingly reduced.

Second, the nature of the aid provided by Title I and the structure of New York City's program militates against church-state entanglement. In contrast to *Lemon* and other cases, no Title I funds are disbursed to nonpublic schools or their employees. Like *Meek*, however, public school employees do provide services on the premises of the nonpublic schools. Yet in *Meek*, not only were the schools pervasively sectarian, but the record provided little or no information on how the publicly employed teachers performed their services or were supervised. See *Meek v. Pittenger*, 374 F. Supp. 639, 656-57 (E.D. Pa. 1974), *aff'd in part, rev'd in part*,

421 U.S. 349 (1975). The Supreme Court thus held that the district court "erred in relying entirely on the good faith and professionalism of the secular teachers and counselors functioning in church-related schools to ensure that a strictly nonideological posture is maintained." 421 U.S. at 349. This Court, however, need not rely solely on the good faith of Title I teachers and supervisors. While the district court in *Meek* stated that "[t]here is no evidence whatsoever that the presence of the therapists in the schools *will* involve them in the religious missions of the schools," 374 F. Supp. at 657 (emphasis added) the affirmative evidence before this Court establishes that Title I personnel *have not* fostered religious views or advanced religious activities. The record here includes a detailed description of how the City's Title I program has operated over a long period of time. Furthermore, the undisputed testimony of numerous Title I personnel demonstrates that they strictly adhere to the regulations restricting their own activities and use of materials, and that they view their role as independent of the nonpublic schools' instructional program. See, e.g., Affidavit of Ilene Baron, sworn to April 5, 1979, ¶¶ 7, 8; Affidavit of Elizabeth Krywucki, sworn to April 5, 1979, ¶¶ 7, 9; Affidavit of Marilyn Lefkowitz, sworn to April 5, 1979 ¶¶ 7, 8; Affidavit of Lenore Haber, sworn to April 5, 1979, ¶¶ 7, 8. In short, because the aid provided under Title I does not result in an "impermissible fostering of religion," the "continuing surveillance" deemed necessary in *Meek* is not required to guard against the advancement of religious views or pursuits.

The relationship between the government and religious authorities is the third factor that must be examined to determine whether Title I creates excessive administrative entanglement. The different types of administrative relationships arise out of New York City's nonpublic school Title I program: (1) supervision of Title I teachers and professionals by Title I and other

public administrators; and (2) routine administrative contact between Title I personnel and nonpublic school administrators.

The first relationship—the supervision of public employees by other public officials—does not directly involve any interaction between the government and the religious institutions. Yet this case involves public supervision on the premises of the parochial schools, an arrangement that the *Meek* Court considered excessively entangled. See 421 U.S. at 370-72. *Meek*, however, does not govern the situation here. The Title I classrooms in which teaching and supervision generally occur are free from religious influences and are distinct from the facilities used by the nonpublic school for regular instructional activities. In the words of Lawrence Larkin, who supervises the City's Title I program for nonpublic schools:

the operation of the Title I program in the nonpublic schools is similar in all material respects to the public school Title I program. In particular, I view the nonpublic school Title I classroom as a school within a school, unaffected by the fact that the nonpublic school in which it is situated is sponsored by or affiliated with a religious denomination.

Larkin Aff. ¶ 107. To the extent that the Title I facility can be considered a public school classroom in a public school, this program is comparable to the arrangement approved in *Wolman*. As stated by the *Wolman* court, “[i]t can hardly be said that the [public] supervision of public employees performing public functions on public property creates an excessive entanglement between church and state.” 433 U.S. at 248.¹³ Furthermore, Ti-

¹³ The intervenor-defendants point out that if New York City leased the Title I classrooms from the nonpublic schools, the arrangement would be comparable to that upheld in *Nebraska State Board of Education v. School District of Hartington*, *supra*. These defendants thus argue that

tle I supervisors maintain a complete separation between Title I activities and the regular programs of the parochial schools. Larkin Aff. ¶ 78. The supervisors have only casual and periodic contact with nonpublic school administrators and little or no contact with nonpublic school teachers when they visit the schools. Affidavit of Roberta Spiegelman, sworn to April 5, 1979, ¶¶ 19, 20; Affidavit of Lucille Stovall, sworn to April 5, 1979, ¶¶ 13, 14. This Court thus disagrees with the plaintiffs' unsupported charge that such supervision constitutes "intrusionary investigatory entrances into the religious schools." Plaintiffs' Trial Memorandum of Law at 10. The supervisor reviews and evaluates only the performance of the Title I teacher in the Title I classroom; neither the parochial school nor its instructional program is subject to public examination. The occasional visits made by Title I supervisors and coordinators do not, therefore, give rise to excessive entanglement.

The routine administrative contacts that occur between Title I personnel and nonpublic school administrators fall into three basic categories: (1) disseminating information about Title I to the administrators; (2) processing requests for services; and (3) resolving

[i]f such lease arrangements existed, the New York City nonpublic school Title I program would presumably be constitutional under the Court's analysis in *Wolman* as well as Justice Brennan's analysis in *Nebraska State Board of Education v. School District of Hartington*, 195 N.W.2d 161 (Neb.), cert. den., 409 U.S. 921 (1972). See pp. 52-53, *infra*. The constitutionality of Title I certainly should not turn on such formal distinctions of real property law. Whether the classrooms are leased by New York City—and thereby become "public property"—would in no way change the fact that those classrooms presently are free of any religious atmosphere and that the instruction that occurs in those classrooms is separate and distinct from the regular classroom instruction in the nonpublic schools.

Post-Trial Brief of Intervenor-Defendants James and Bessie Bovis at 51.

scheduling problems and other questions concerning the implementation of the program. Larkin Aff. ¶ 116. These contacts neither give the parochial school officials any control over the program nor involve Title I personnel in the affairs of the parochial schools. *See generally id.* ¶¶ 117-27.

Minor administrative contacts between public employees or officials and religious authorities do not violate the Establishment Clause. *See Wolman v. Walter, supra*, 433 U.S. at 246 n.13; *Walz v. Tax Comm'n, supra*, 397 U.S. at 674-76. Although the interaction here may be more extensive than in prior cases, it appears to fall within the realm of permissible government-church contacts. The *Meek* Court feared that the presence of public school teachers in parochial schools "has the potential for provoking controversy between the Commonwealth and religious authorities over the extent of the teachers' responsibilities and the meaning of the legislative and administrative restrictions on the content of their instructions." 421 U.S. at 372 n.22. This potential for controversy has not been realized in New York City's Title I program. The Title I teachers' responsibilities are clearly defined, and the nonpublic school officials understand that they have no control or authority over the program. The record demonstrates that the program's design and implementation have successfully avoided any confrontation between government officials and parochial school administrators. *See, e.g., Larkin Aff. ¶¶113, 127; Affidavit of Bernice Kagel, sworn to April 5, 1979, m ¶ 9; Affidavit of Faith Rubin, sworn to April 5, 1979, ¶ 18; Affidavit of Sister Miriam Blake, sworn to April 3, 1979, ¶ 15; Affidavit of Sister Mary DeSales, sworn to April 3, 1979, ¶¶ 13, 14.*¹⁴

¹⁴ In an opinion recently affirmed by the Supreme Court, a three-judge court in this district stated:

Although *Wolman* does not expressly renounce *Meek*'s theory that aid to a sectarian school's education activities is *per se* unconstitutional, it does revive the more flexible

Title I is fundamentally different than those educational aid programs that have been found to create "the potential for divisive religious fragmentation in the political arena." *Tilton v. Richardson*, *supra*, 403 U.S. at 688. The state statutes invalidated in *Lemon*, *Nyquist*, and *Meek* were directed to a narrow class of beneficiaries, nonpublic schools that were predominantly church-related. The Court feared that annual appropriations for such programs and recurrent legislative evaluations would produce political conflict along religious lines. *Meek v. Pittenger*, *supra*, 421 U.S. at 372; *Lemon v. Kurtzman*, *supra*, 403 U.S. at 623. In the Court's view, "the narrowness of the benefited class" is an important factor in measuring the "potential divisiveness" of any legislative enactment. *Committee for Public Education v. Nyquist*, *supra*, 413 U.S. at 794.

The nationwide class benefited by Title I includes educationally deprived children in both public and nonpublic schools. Only four percent of the national Title I budget is allocated to nonpublic school students, and fewer than one-fourth of the parochial schools in New York City have Title I services on their premises. Legislative consideration of the statute, as well as annual appropriations, are thus far less likely to give rise to political debates about aid to religion. Indeed, al-

concept that state aid may be extended to such a school's educational activities if it can be shown with a high degree of certainty that the aid will only have secular value of legitimate interest to the State and does not present any appreciable risk of being used to aid transmission of religious views.

Committee for Public Education v. Levitt, 461 F. Supp. 1123, 1127 (S.D.N.Y. 1978), *aff'd sub nom. Committee for Public Education v. Regan*, 48 U.S.L.W. 4168 (U.S., February 20, 1980 (footnotes omitted)). The court noted that "this certainty must be achieved without an excessive entanglement of the State with the sectarian institution." *Id.* n.6. Applying this "flexible concept," this Court finds that the requisite "degree of certainty" has been established here without excessive administrative entanglement.

though Congress has appropriated funds for Title I since 1965 and has occasionally amended the statute, no evidence of any “divisive religious fragmentation” has been presented. Furthermore, the proportion of the funds allocated to public and nonpublic school students is determined administratively by the New York City Board of Education pursuant to a formula mandating comparable per pupil expenditures. Larkin Aff. ¶¶ 32-35. The amount of money spent for each public and nonpublic school student is thus dictated by statutory and regulatory requirements that have not been the subject of continuous political debate. Finally, the Title I advisory councils that have been established pursuant to a statutory directive, 20 U.S.C. § 2735, have helped to defuse any potential for political tension between the public and nonpublic school sectors. Larkin Aff. ¶¶ 113, 114.

In sum, the evidence presented in this case establishes that New York City’s Title I program neither creates excessive administrative entanglement nor results in divisive political fragmentation. *Meek* is therefore distinguishable from the case at bar. The Court concludes that Title I satisfies the third criterion of the Establishment Clause test.

Conclusion

The Supreme Court has observed that “[t]he task of deciding when the Establishment Clause is implicated in the context of parochial school aid has proved to be a delicate one . . . [that] requires a careful evaluation of the facts of the particular case.” *Wolman v. Walter*, *supra*, 417 U.S. at 426. Having considered all the evidence presented in this action, this Court concludes that New York City’s Title I program does not violate the First Amendment’s prohibition against the establishment of religion. The program has a secular purpose and neither advances religion nor creates excessive entanglement between the government and religious au-

thorities. While Title I could conceivably engender a program that did not satisfy Establishment Clause standards, this Court will not rule on the basis of abstract propositions. No constitutional infirmity has been revealed on the facts of this case. Accordingly, both the statute and the City's program survive judicial scrutiny.

So ordered.

/S/ ELLSWORTH A. VAN GRAAFEILAND, PER C.H.T.

ELLSWORTH A. VAN GRAAFEILAND, C.J.

/S/ CHARLES H. TENNEY

CHARLES H. TENNEY, D.J.

/S/ VINCENT L. BRODERICK

VINCENT L. BRODERICK, D.J.

Dated: New York, New York

April 18, 1980

APPENDIX D
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the ninth day of July, one thousand nine hundred and eighty-four.

Present: Hon. WILFRED FEINBERG, *Chief Judge*;
Hon. HENRY P. FRIENDLY; Hon. JAMES L. OAKES;
Circuit Judges.

83-6359

[Filed July 9, 1984]

BETTY-LOUISE FELTON, CHARLOTTE GREEN,
BARBARA HRUSKA, MERYL A. SCHWARTZ,
ROBERT H. SIDE AND ALLEN H. ZELON,
PLAINTIFFS-APPELLANTS,

-against-

SECRETARY, UNITED STATES DEPARTMENT OF
EDUCATION, AND THE CHANCELLOR OF THE
BOARD OF EDUCATION OF THE CITY OF NEW
YORK, DEFENDANTS-APPELLEES,

-and-

YOLANDA AGUILAR, LILLIAN COLON, MIRIAM
MARTINEZ AND BELINDA WILLIAMS,
INTERVENOR-DEFENDANTS-APPELLEES.

Appeal from the United States District Court for the
Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed and the action be and it hereby is remanded to the said district court for further proceedings in accordance with the opinion of this court with costs to be taxed against the appellees.

Further ordered that the issuance of the mandate shall be stayed until thirty days after the final disposition of any timely petition for rehearing or suggestions for rehearing en banc, in order to enable appellees, if they remain aggrieved, to petition the Supreme Court for certiorari (or, if they should consider this appropriate, to appeal under 28 U.S.C. § 1252), and, if such a petition be filed and/or such an appeal be taken, until the final disposition thereof.

ELAINE B. GOLDSMITH,
Clerk

/s/ Edward J. Guardaro

By EDWARD J. GUARDARO,
Deputy Clerk

APPENDIX E
IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 83-6359

BETTY-LOUISE FELTON, ET AL.,
PLAINTIFFS-APPELLANTS,

v.

**SECRETARY, UNITED STATES DEPARTMENT OF
EDUCATION, ET AL., DEFENDANTS-APPELLEES,**

and

YOLANDA AGUILAR, ET AL.,
INTERVENOR-DEFENDANTS-APPELLEES.

[Filed August 2, 1984]

**NOTICE OF APPEAL TO THE SUPREME
COURT OF THE UNITED STATES**

Notice is hereby given this 1st day of August, 1984, that the defendant-appellee Secretary of Education hereby appeals to the Supreme Court of the United States from the judgment of this Court entered on the 9th day of July, 1984, in favor of the plaintiffs-appellants.

This appeal is taken pursuant to 28 U.S.C. 1252 and 28 U.S.C. 2101(a).

Respectfully submitted,

RICHARD K. WILLARD
Acting Assistant Attorney General
RAYMOND J. DEARIE
United States Attorney

/s/

ANTHONY J. STEINMEYER
(202) 633-3388

/s/

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Washington, D.C. 20530

APPENDIX F

1. The First Amendment of the United States Constitution provides in pertinent part:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * * .

2. Title I of the Elementary and Secondary Education Act of 1965, as amended, 20 U.S.C. 2701 *et. seq.*, provides in pertinent part:

20 U.S.C. 2701 Declaration of policy:

In recognition of the special educational needs of children of low-income families and the impact that concentrations of low-income families have on the ability of local educational agencies to support adequate educational programs, the Congress hereby declares it to be the policy of the United States to provide financial assistance (as set forth in the following parts of this subchapter) to local educational agencies serving areas with concentrations of children from low-income families to expand and improve their educational programs by various means (including preschool programs) which contribute particularly to meeting the special educational needs of educationally deprived children. Further, in recognition of the special educational needs of children of certain migrant parents, of Indian children and of handicapped, neglected, and delinquent children, the Congress hereby declares it to be the policy of the United States to provide financial assistance (as set forth in the following parts of this subchapter) to help meet the special educational needs of such children.

20 U.S.C. 2736:

(c) Federal funds to supplement, not supplant regular non-Federal funds

A local educational agency may use funds received under this subchapter only so as to supplement and, to the extent practical, increase the level of funds that would, in the absence of such Federal funds, be made available from regular non-

Federal sources and from non-Federal sources for State phase-in programs described in section 2751(b) of this title for the education of pupils participating in programs and projects assisted under this subchapter, and in no case may such funds be so used as to supplant such funds from such non-Federal sources.

20 U.S.C. 2740:

(a) General requirements:

To the extent consistent with the number of educationally deprived children in the school district of the local educational agency who are enrolled in private elementary and secondary schools, such agency shall make provision for including special educational services and arrangements (such as dual enrollment, educational radio and television, and mobile educational services and equipment) in which such children can participate and meeting the requirements of sections 2732 and 2733 of this title, and subsections (a), (b), (d), and (m) of section 2734 of this title, and subsection (c) of section 2736 of this title. Expenditures for educational services and arrangements pursuant to this section for educationally deprived children in private schools shall be equal (taking into account the number of children to be served and the special educational needs of such children) to expenditures for children enrolled in the public schools of the local educational agency.

(b) By-pass provision

(1) If a local educational agency is prohibited by law from providing for the participation in special programs for educationally deprived children enrolled in private elementary and secondary schools as required by subsection (a) of this section, the Secretary shall waive such requirement, and shall arrange for the provision of services to such children through arrangements which shall be subject to the requirements of subsection (a) of this section.

(2) If the Secretary determines that a local educational agency has substantially failed to provide for the participation on an equitable basis of educationally deprived children enrolled in private elementary and secondary schools as required by subsection (a) of this section, he shall arrange for the provision of services to such children through arrangements which shall be subject to the requirements of subsection (a) of this section, upon which determination the provisions of subsection (a) of this section shall be waived.

(3)(A) When the Secretary arranges for services pursuant to this subsection, he shall, after consultation with the appropriate public and private school officials, pay to the provider the cost of such services, including the administrative cost of arranging for such services, from the appropriate allocation or allocations under this subchapter.

(B) Pending final resolution of any investigation or complaint that could result in a determination under this subsection, the Secretary may withhold from the allocation of the affected State or local educational agency the amount he estimates would be necessary to pay the cost of such services.

(C) Any determination by the Secretary under this section shall continue in effect until the Secretary determines that there will no longer be any failure or inability on the part of the local educational agency to meet the requirements of subsection (a) of this section.

(4)(A) The Secretary shall not take any final action under this subsection until the State educational agency and local educational agency affected by such action have had an opportunity, for at least forty-five days after receiving written notice thereof, to submit written objections and to appear before the Secretary or his design-

nee to show cause why such action should not be taken.

(B) If a State or local educational agency is dissatisfied with the Secretary's final action after a proceeding under subparagraph (A) of this paragraph, it may within sixty days after notice of such action, file with the United States court of appeals for the circuit in which such State is located a petition for review of that action. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary. The Secretary thereupon shall file in the court the record of the proceedings on which he based his action, as provided in section 2112 of title 28.

(C) The findings of fact by the Secretary, if supported by substantial evidence, shall be conclusive; but the court, for good cause shown, may remand the case to the Secretary to take further evidence, and the Secretary may thereupon make new or modified findings of fact and may modify his previous action, and shall file in the court the record of the further proceedings. Such new or modified findings of fact shall likewise be conclusive if supported by substantial evidence.

(D) Upon the filing of a petition under subparagraph (B), the court shall have jurisdiction to affirm the action of the Secretary or to set it aside, in whole or in part. The judgment of the court shall be subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

20 U.S.C. 2836(a):

Whenever the Secretary after reasonable notice to any State educational agency and an opportunity for a hearing on the record, finds that there has been a failure to comply substantially with any assurance set forth in the application of that State

approved under section 2762 or 2802 of this title, the Secretary shall notify the agency that further payments will not be made to the State under this subchapter (or, in his discretion, that the State educational agency shall reduce or terminate further payments under this subchapter to specified local educational agencies or State agencies affected by the failure) until he is satisfied that there is no longer any such failure to comply. Until he is so satisfied, (1) no further payments shall be made to the State under this subchapter, or (2) payments by the State educational agency under this subchapter shall be limited to local educational agencies and State agencies not affected by the failure, or (3) payments to particular local educational agencies or State agencies shall be reduced, as the case may be. Where partial payments to a local educational agency are continued under this subsection, the expenditure of the payments shall be subject to such conditions as the Secretary deems appropriate in light of the failure which led to the partial withholding. In the case of a substantial and continuing violation, the Secretary may suspend payments to such agency, after such agency has been given reasonable notice and opportunity to show cause why such action should not be taken.

3. Chapter 1 of the Education Consolidation and Improvement Act of 1981, 20 U.S.C. 3801 *et seq.*, provides in pertinent part:

20 U.S.C. 3801:

The Congress declares it to be the policy of the United States to continue to provide financial assistance to State and local educational agencies to meet the special needs of educationally deprived children, on the basis of entitlements calculated under title I of the Elementary and Secondary Education Act of 1965 [20 U.S.C. 2701 *et seq.*], but to do so in a manner which will eliminate burden-

some, unnecessary, and unproductive paperwork and free the schools of unnecessary Federal supervision, direction, and control. Further, the Congress recognizes the special educational needs of children of low-income families, and that concentrations of such children in local educational agencies adversely affect their ability to provide educational programs which will meet the needs of such children. The Congress also finds that Federal assistance for this purpose will be more effective if education officials, principals, teachers, and supporting personnel are freed from overly prescriptive regulations and administrative burdens which are not necessary for fiscal accountability and make no contribution to the instructional program.

20 U.S.C. 3802:

During the period beginning October 1, 1982, and ending September 30, 1987, the Secretary shall, in accordance with the provisions of this chapter, make payments to State educational agencies for grants made on the basis of entitlements created under title I of the Elementary and Secondary Education Act of 1965 [20 U.S.C. 2701 et seq.] and calculated in accordance with provisions of that title in effect on September 30, 1982.

20 U.S.C. 3803:

(a) Program eligibility

Except as otherwise provided in this chapter, the Secretary shall make payments based upon the amount of, and eligibility for, grants as determined under the following provisions of title I of the Elementary and Secondary Education Act [20 U.S.C. 2701 et seq.] in effect on September 30, 1982:

(1) Part A—"Programs Operated by Local Education Agencies" [20 U.S.C. 2711 et seq.]:

(A) Subpart 1—"Basic Grants" [20 U.S.C. 2711 et seq.] and

(B) Subpart 2—"Special Grants" [20 U.S.C. 2721 et seq.].

(2) Part B—"Programs Operated by State Agencies" [20 U.S.C. 2761 et seq.]:

(A) Subpart 1—"Programs for Migratory Children" [20 U.S.C. 2761 et seq.];

(B) Subpart 2—"Programs for Handicapped Children" [20 U.S.C. 2771 et seq.];

(C) Subpart 3—"Programs for Neglected and Delinquent Children" [20 U.S.C. 2781 et seq.]; and

(D) Subpart 4—"General Provisions for State Operated Programs" [20 U.S.C. 2791 et seq.].

(b) Administrative provisions

The Secretary, in making the payments and determinations specified in subsection (a) of this section, shall continue to use the following provisions of title I of the Elementary and Secondary Education Act [20 U.S.C. 2701 et seq.] as in effect on September 30, 1982:

(1) Part E—"Payments" [20 U.S.C. 2841 et seq.]:

(A) Section 191—"Payment Methods" [20 U.S.C. 2841];

(B) Section 192—"Amount of Payments to Local Educational Agencies" [20 U.S.C. 2842];

(C) Section 193—"Adjustments Where Necessary by Appropriations" [20 U.S.C. 2843]; and

(D) Section 194—"Payments for State Administration" [20 U.S.C. 2844], subject to subsection (d) of this section.

(2) Part F—"General Provisions" [20 U.S.C. 2851 et seq.]:

(A) Section 197—"Limitation on Grants to Puerto Rico" [20 U.S.C. 2853]; and

(B) Section 198—"Definitions" [20 U.S.C. 2854] and conforming amendments to other Acts, except that only those definitions applicable to this chapter shall be used.

(c) Applicability rule

The provisions of title I of the Elementary and Secondary Education Act of 1965 [20 U.S.C. 2701 et seq.] which are not specifically made applicable by this subchapter shall not be applicable to programs authorized under this subchapter.

20 U.S.C. 3804:**(a) General**

Each State and local educational agency shall use the payments under this subchapter for programs and projects (including the acquisition of equipment and, where necessary, the construction of school facilities) which are designed to meet the special educational needs of educationally deprived children.

(b) Program design

State Agency programs shall be designed to serve those categories of children counted for eligibility for grants under section 3803(a)(2) of this title in accordance with the requirements of this subchapter.

(c) Program description

A local education agency may use funds received under this subchapter only for programs and projects which are designed to meet the special educational needs of educationally deprived children identified in accordance with section 3805(b)(2) of this title, and which are included in an application for assistance approved by the State educational agency. Such programs and projects may include the acquisition of equipment and instructional materials, employment of special instructional and counseling and guidance personnel, employment and training of teacher aides, payments to teachers of amounts in excess of regular salary schedules as a bonus for service in schools serving project areas, the training of teachers, the construction, where

necessary, of school facilities, other expenditures authorized under title I of the Elementary and Secondary Education Act [20 U.S.C. 2701 et seq.] as in effect September 30, 1982, and planning for such programs and projects.

(d) Records and information

Each State educational agency shall keep such records and provide such information to the Secretary as may be required for fiscal audit and program evaluation (consistent with the responsibilities of the Secretary under this subchapter).

20 U.S.C. 3805:

(a) Application by local educational agency

A local educational agency may receive a grant under this subchapter for any fiscal year if it has on file with the State educational agency an application which describes the programs and projects to be conducted with such assistance for a period of not more than three years, and such application has been approved by the State educational agency.

(b) Application assurances

The application described in subsection (a) of this section shall be approved if it provides assurances satisfactory to the State educational agency that the local educational agency will keep such records and provide such information to the State educational agency as may be required for fiscal audit and program evaluation (consistent with the responsibilities of the State agency under this subchapter), and that the programs and projects described—

(1)(A) are conducted in attendance areas of such agency having the highest concentrations of low-income children;

- (B) are located in all attendance areas of an agency which has a uniformly high concentration of such children; or
- (C) are designed to utilize part of the available funds for services which promise to provide significant help for all such children served by such agency;
- (2) are based upon an annual assessment of educational needs which identifies educationally deprived children in all eligible attendance areas, permits selection of those children who have the greatest need for special assistance, and determines the needs of participating children with sufficient specificity to ensure concentration on those needs;
- (3) are of sufficient size, scope, and quality to give reasonable promise of substantial progress toward meeting the special educational needs of the children being served and are designed and implemented in consultation with parents and teachers of such children;
- (4) will be evaluated in terms of their effectiveness in achieving the goals set for them, and that such evaluations shall include objective measurements of educational achievement in basic skills and a determination of whether improved performance is sustained over a period of more than one year; and
- (5) make provision for services to educationally deprived children attending private elementary and secondary schools in accordance with section 3806 of this title.

20 U.S.C. 3806:

(a) General requirements

To the extent consistent with the number of educationally deprived children in the school district of the local educational agency who are enrolled in private elementary and secondary schools, such

agency shall make provisions for including special educational services and arrangements (such as dual enrollment, educational radio and television, and mobile educational services and equipment) in which such children can participate and which meet the requirements of sections 3804(c), 3805(b)(2), (3), and (4), and 3807(b) of this title. Expenditures for educational services and arrangements pursuant to this section for educationally deprived children in private schools shall be equal (taking into account the number of children to be served and the special educational needs of such children) to expenditures for children enrolled in the public schools of the local educational agency.

(b) Bypass provision

(1) If a local educational agency is prohibited by law from providing for the participation in special programs for educationally deprived children enrolled in private elementary and secondary schools as required by subsection (a) of this section, the Secretary shall waive such requirements, and shall arrange for the provision of services to such children through arrangements which shall be subject to the requirements of subsection (a) of this section.

(2) If the Secretary determines that a local educational agency has substantially failed to provide for the participation on an equitable basis of educationally deprived children enrolled in private elementary and secondary schools as required by subsection (a) of this section, he shall arrange for the provision of services to such children through arrangements which shall be subject to the requirements of subsection (a) of this section, upon which determination the provisions of subsection (a) of this section shall be waived.

(3)(A) When the Secretary arranges for services pursuant to this subsection, he shall, after consultation with the appropriate public and pri-

vate school officials, pay to the provider the cost of such services, including the administrative cost of arranging for such services, from the appropriate allocation or allocations under this subchapter.

(B) Pending final resolution of any investigation or complaint that could result in a determination under this subsection, the Secretary may withhold from the allocation of the affected State or local educational agency the amount he estimates would be necessary to pay the cost of such services.

(C) Any determination by the Secretary under this section shall continue in effect until the Secretary determines that there will no longer be any failure or inability on the part of the local educational agency to meet the requirements of subsection (a) of this section.

(4)(A) The Secretary shall not take any final action under this subsection until the State educational agency and local educational agency affected by such action have had an opportunity, for at least forty-five days after receiving written notice thereof, to submit written objections and to appear before the Secretary or his designee to show cause why such action should not be taken.

(B) If a State or local educational agency is dissatisfied with the Secretary's final action after a proceeding under subparagraph (A) of this paragraph, it may within sixty days after notice of such action, file with the United States court of appeals for the circuit in which such State is located a petition for review of that action. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary. The Secretary thereupon shall file in the court the record of the proceedings on which he based his action, as provided in section 2112 of title 28.

(C) The findings of fact by the Secretary, if supported by substantial evidence, shall be conclusive; but the court, for good cause shown, may remand the case to the Secretary to take further evidence, and the Secretary may thereupon make new or modified findings of fact and may modify his previous action, and shall file in the court the record of the further proceedings. Such new or modified findings of fact shall likewise be conclusive if supported by substantial evidence.

(D) Upon the filing of a petition under subparagraph (B), the court shall have jurisdiction to affirm the action of the Secretary or to set it aside, in whole or in part. The judgment of the court shall be subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

(c) Existing bypass provision

Any bypass determination by the Secretary under title I of the Elementary and Secondary Education Act of 1965 [20 U.S.C. 2701 et seq.] prior to August 13, 1981, shall remain in effect to the extent consistent with the purposes of this subchapter.

20 U.S.C. 3807(b):

A local educational agency may use funds received under this subchapter only so as to supplement and, to the extent practical, increase the level of funds that would, in the absence of such Federal funds, be made available from non-Federal sources for the education of pupils participating in programs and projects assisted under this subchapter, and in no case may such funds be so used as to supplant such funds from such non-Federal sources. In order to demonstrate compliance with this subsection a local education agency

shall not be required to provide services under this subchapter outside the regular classroom or school program.

20 U.S.C. 3872:

(a) Whenever the Secretary after reasonable notice to any State educational agency and an opportunity for a hearing on the record, finds that there has been a failure to comply substantially with any assurances required to be given or conditions required to be met under this chapter the Secretary shall notify such agency of these findings and that beginning sixty days after the date of such notification, further payments will not be made to the State under this chapter; or affected subchapter thereof (or, in his discretion, that the State educational agency shall reduce or terminate further payments under the chapter or affected subchapter thereof, to specified local educational agencies or State agencies affected by the failure) until he is satisfied that there is no longer any such failure to comply. Until he is so satisfied, (1) no further payments shall be made to the State under the chapter or affected subchapter thereof, or (2) payments by the State educational agency under the chapter or affected subchapter thereof shall be limited to local educational agencies and State agencies not affected by the failure, or (3) payments to particular local educational agencies shall be reduced, as the case may be.

Upon submission to a State of a notice under subsection (1) of this section that the Secretary is withholding payments, the Secretary shall take such action as may be necessary to bring his action to the attention of the public within the State.

4. 34 C.F.R. Part 200 (1983), provides in relevant part:

SUBPART E—PARTICIPATION IN CHAPTER 1 PROGRAMS OF EDUCATIONALLY DEPRIVED CHILDREN IN PRIVATE SCHOOLS

§ 200.70 Responsibility of LEAs.

(a)(1) In consultation with private school officials, an LEA shall provide educationally deprived children residing in a project area of the LEA who are enrolled in private elementary and secondary schools with special educational services and arrangements as will assure participation on an equitable basis of those children in accordance with the requirements in §§200.70-200.75 and Section 557(a) of Chapter 1.

(2) If the LEA decides to serve educationally deprived, low-income children under Section 556(b)(1)(C) of Chapter 1, the LEA shall also provide Chapter 1 services to educationally deprived, low-income children in private schools as will assure participation on an equitable basis of those children in accordance with the requirements in §§ 200.70-200.75 and Section 557(a) of Chapter 1.

(b) The LEA shall provide the opportunity to participate in a manner that is consistent with the number and special educational needs of the educationally deprived children in private schools.

(c) The LEA shall exercise administrative direction and control over Chapter 1 funds and property that benefit educationally deprived children in private schools.

(d)(1) Provision of services to children enrolled in private schools must be provided by employees of a public agency or through contract by the public agency with a person, an association agency or corporation who or which, in the provision of those services, is independent of the private school and of any religious organizations.

(2) This employment or contract must be under the control and supervision of the public agency.

(e) In its application for Chapter 1 funds, the LEA shall make provision for services to educationally deprived children attending private elementary and secondary schools.

(Sec. 555, 20 U.S.C. 3804; Sec. 556(b)(5), 20 U.S.C. 3805(b)(5); Sec. 557(a), 20 U.S.C. 3871(a); Sec. 596(a), 20 U.S.C. 3876(a))

§ 200.71 Factors used in determining equitable participation.

(a) *Equal expenditures.* Expenditures for educational services and arrangements for educationally deprived children in private schools must be equal (taking into account the number of children to be served and the special educational needs of such children) to expenditures for children enrolled in the public schools of the LEA.

(b) *Services on an equitable basis.* The Chapter 1 services that an LEA provides for educationally deprived children in private schools must be equitable (in relation to the services provided to public school children) and must be of sufficient size, scope, and quality to give reasonable promise of substantial progress toward meeting the special educational needs of the private school children to be served.

(Sec. 557(a), 20 U.S.C. 3806(a); Sec. 556(b)(3), 20 U.S.C. 3805(b)(3))

§ 200.72 Funds not to benefit a private school.

(a) An LEA shall use Chapter 1 funds to provide services that supplement the level of services that would, in the absence of Chapter 1 services, be available to children in private schools.

(b) An LEA shall use Chapter 1 funds to meet the special educational needs of children in private schools, but not for—

- (1) The needs of the private schools; or
- (2) The general needs of the children in the private schools.

(Sec. 557(a), 20 U.S.C. 3806(a))

§ 200.73 Use of public school employees.

An LEA may use Chapter 1 funds to make public employees available in other than public facilities.

(a) To the extent necessary to provide equitable Chapter 1 services designed for children in a private school; and

(b) If those services are not normally provided by the private school.

(Sec. 557(a), 20 U.S.C. 3806(a))

§ 200.74 Equipment and supplies.

(a) To meet the requirements of Section 557(a) of Chapter 1, a public agency must keep title to and exercise continuing administrative control of all equipment and supplies that the LEA acquires with Chapter 1 funds.

(b) The public agency may place equipment and supplies in a private school for the period of time needed for the program.

(c) The public agency shall ensure that the equipment or supplies placed in a private school—

(1) Are used for Chapter 1 purposes; and

(2) Can be removed from the private school without remodeling the private school facility.

(d) The public agency shall remove equipment or supplies from a private school if—

(1) The equipment or supplies are no longer needed for Chapter 1 purposes; or

(2) Removal is necessary to avoid use of the equipment or supplies for other than Chapter 1 purposes.

(e) For the purpose of this section, the term "public agency" includes the LEA.

(Sec. 557(a), 20 U.S.C. 3806(a); Sec. 596(a), 20 U.S.C. 3876(a))

§ 200.75 Construction.

No Chapter 1 funds may be used for repairs, minor remodeling, or construction of private school facilities.

(Sec. 557(a), 20 U.S.C. 3806(a))

**SUBPART F—DUE PROCESS PROCEDURES
PROCEDURES FOR BYPASS****§ 200.80 Bypass—General.**

(a) The Secretary implements a bypass if an LEA—

(1) Is prohibited by law from providing Chapter 1 services for private school children on an equitable basis; or

(2) Has substantially failed to provide for the participation on an equitable basis of educationally deprived children enrolled in private elementary and secondary schools.

(b) If the Secretary implements a bypass, the Secretary waives the LEA's responsibility for providing Chapter 1 services for private school children and arranges to provide the required services. Normally, the Secretary hires a contractor to provide the Chapter 1 services for private school children under a bypass. The Secretary deducts the cost of these services, including any administrative costs, from the appropriate allocations of Chapter 1 funds provided to the affected LEA and SEA. In arranging for these services, the Secretary consults with appropriate public and private school officials.

(Sec. 557(b), 20 U.S.C. 3806(b))

§ 200.81 Notice by the Secretary.

(a) Before taking any final action to implement a bypass, the Secretary provides the affected LEA and SEA with written notice.

(b) In the written notice, the Secretary—

- (1) States the reasons for the proposed bypass in sufficient detail to allow the LEA and SEA to respond;
- (2) Cites the requirement that is the basis for the alleged failure to comply; and
- (3) Advises the LEA and SEA that they have at least 45 days from receipt of the written notice to submit written objections to the proposed bypass and may request in writing the opportunity for a hearing to show cause why the bypass should not be implemented.

(c) The Secretary sends the notice to the LEA and SEA by certified mail with return receipt requested.

(Sec. 557(b)(4)(A), 20 U.S.C. 3806(b)(4)(A))

§ 200.82 Bypass procedures.

Sections 200.83-200.85 contain the procedures that the Secretary uses in conducting a show cause hearing. These procedures may be modified by the hearing officer if all parties agree it is appropriate to modify them for a particular case.

(Sec. 557(b)(4)(A), 20 U.S.C. 3806(b)(4)(A)).

§ 200.83 Appointment and functions of a hearing officer.

(a) If an LEA or SEA requests a show cause hearing, the Secretary appoints a hearing officer and notifies appropriate representatives of the affected private school children that they may participate in the hearing.

(b) The hearing officer has no authority to require or conduct discovery, or to rule on the validity of any statute or regulation.

(c) The hearing officer notifies the LEA, SEA, and representatives of the private school children of the time and place of the hearing.

(Sec. 557(b)(4)(A), 20 U.S.C. 3806(b)(4)(A))

§ 200.84 Hearing procedures.

(a) At the hearing, a transcript is taken. The LEA, SEA, and representatives of the private school children each may be represented by legal counsel, and each may submit oral or written evidence and arguments at the hearing.

(b) Within ten days after the hearing, the hearing officer indicates that a decision will be issued on the basis of the existing record, or requests further information from the LEA, SEA, representatives of the private school children, or Department of Education officials.

(Sec. 557(b)(4)(A), 20 U.S.C. 3806(b)(4)(A))

§ 200.85 Post hearing procedures.

(a) Within 120 days after the hearing record is closed, the hearing officer issues a written decision on whether the proposed bypass should be implemented. The hearing officer sends copies of the decision to the LEA, SEA, representatives of the private school children, and the Secretary.

(b) The LEA, SEA, and representatives of the private school children each may submit written comments on the decision to the Secretary within 30 days from the receipt of the hearing officer's decision.

(c) The Secretary may adopt, reverse, or modify the hearing officer's decision.

(Sec. 557(b)(4)(A), 20 U.S.C. 3806(b)(4)(A))